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Supreme Court of the United States

OCTOBER TERM, 1925

No. ~~114~~ 19.

NORTH GERMAN LLOYD, APPELLANT

versus

THE UNITED STATES OF AMERICA,
APPELLEE

APPEAL FROM COURT OF CLAIMS

Compensation for Expropriated German Merchant Ships

BRIEF FOR APPELLANT

EDGAR W. HUNT,
Counsel for Appellant

FOREWORD

Contrary to a belief more or less widely held, the German ship-owners have not received and are not entitled to compensation from their own Government for ships that, having taken refuge in American harbors prior to our entering the war, were taken over by the United States after that event. (See infra p. 112). Unless therefore, relief is accorded them in the suits now pending, of which this is one, they will be wholly without legal remedy for the loss of over 500,000 gross tons of shipping to which the United States acquired absolute title by measures hereinafter referred to.

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 114

NORTH GERMAN LLOYD,
Appellant

versus

THE UNITED STATES OF AMERICA,
Appellee

BRIEF FOR APPELLANT

Compensation for Expropriated German Merchant Ships

THE OPINION BELOW

For opinion referred to by Court of Claims in support of Memo in instant case, see Deutsch - Australische Dampfschiffs - Gesellschaft v. United States, 59 Ct. Cls. 450, and transcript in this case, p. 7.

For Memo in the instant case see Transcript of Record p. 7 and this Brief p. 6.

Grounds on which the jurisdiction is invoked

The judgment under review (sustaining Defendant's demurrer) was entered in the court of Claims March 17, 1924 (R. 7).

In that Court appellant advanced the claim that the United States was obliged, by virtue of the Constitution (Amendment V), a Joint Resolution of

Congress adopted May 12, 1917 (40 Stats. 75, this brief p. 3), and implied contract, to pay appellant the market value of certain merchant ships belonging to it and expropriated by the United States; and that appellant had a right to recover such market value by suit in the Court of Claims. (Petition, R 1, et seq.) The defendant demurred on the ground that the petition did not state a cause of action. The Court of Claims sustained the Demurrer solely on the ground that it did not have jurisdiction of the suit (R. 6-7.)

Appeal was applied for June 3, 1924 and allowed June 17, 1924 (R. 14, pursuant to Sections 242 and 243 of the Judicial Code (36 Stats. 1157), as the same then stood.

The following cases are believed to sustain the jurisdicton: *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645; *U. S. v. Lynah*, 188 U. S. 445; *U. S. v. Buffalo Pitts Co.*, 234 U. S. 228; *U. S. v. North American Trans. & Trading Co.*, 253 U. S. 330; *Seaboard Air Line Ry. Co. v. U. S.*, 261 U. S. 299; *A. W. Duckett & Co., Inc. v. U S.*, 266 U. S. 149; *Campbell v. U. S.*, 266 U. S. 368.

In the argument it is endeavored to show that the decisions just cited, although evoked by cases which involved only the rights of citizens, are applicable and controlling in the present suit, notwithstanding appellant was an alien enemy at the time its ships were taken. The fundamental question in the case relates to the rights of aliens, in respect of their private property situated here, upon the outbreak of war between their country and ours; and numerous authorities,—the most important of these being *Brown v. U. S.*, 8 Cranch 110,—are cited to sustain the view that, at least in the absence of an act of Congress to the contrary, their rights are in this respect the same as those of a citizen.

STATEMENT.

This suit seeks compensation for 29 merchant ships, of an aggregate tonnage of 230,000 tons, formerly belonging to claimant, the title to which was acquired by the United States by virtue of Proclamations issued by the President pursuant to a discretionary power vested in him by a joint Resolution of Congress approved May 12, 1917 (40 Stats. 75), reading as follows:

> "Joint Resolution Authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes:
>
> *"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency

of the Government, to operate, lease, charter and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby authorized, and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

The Petition (R. 1) sets forth facts which may be summarized as follows:

Appellant is a corporation of Germany, whose government accords to American citizens the right to sue it in its courts. For many years prior to 1914 appellant operated steamship services in all parts of the world, which it was compelled to discontinue at the outbreak of the war in Europe in August, 1914. Such of its ships as were then in American harbors remained there, and others which were at sea abandoned their voyages and ran into American harbors, as ports of refuge, for the purpose of escaping capture by the enemy, who controlled the seas. The whole number of appellant's ships which thus sought refuge in our territory (then neutral) was 29, of an aggregate tonnage of about 230,000 tons. They were all merchant ships and at the outbreak of the war had been engaged in ordinary commercial voyages.

On April 6, 1917, Congress adopted a Joint Res-

olution (40 Stats. 1), formally declaring the existence of a state of war between the United States and Germany, and on the same day all of appellant's vessels were entered upon and taken possession of by the United States, acting by and through its officers and agents.

Later and at various dates within not more than one year from May 12, 1917, the actual title to all of said ships was taken over to the United States, by Proclamations issued by the President pursuant to the authority given him by the said Joint Resolution of May 12, 1917, printed above.

Appellant sues for the property values which it lost and the United States gained when title passed to the United States.

The petition alleges the suit to be founded upon the Constitution, the aforesaid Joint Resolution, an implied contract to pay compensation, and a claim not sounding in tort for damages.

The jurisdictional averments are made that no action on the claim has been had in Congress, that appellant is the owner of its claim, that no assignment of the claim has been made, that no suits are pending in any other court based upon the facts here involved against any person who was, in respect thereto, acting in behalf of the United States, and that the suit is brought within six years after the claim first accrued.

Several Proclamations, (all in substance alike), taking title to ships, were issued by the President under authority of the Joint Resolution of May 12, 1917. The principal one, by which the ownership of 69 vessels, including all but 4 of those taken from

appellant, was acquired by the United States, was issued June 30, 1917, and was in form as follows:

"Whereas the following joint resolution adopted by Congress was approved by the President May 12, 1917:

"Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes:

(Here is set forth the complete text of the Joint Resolution.)

"And whereas the following vessels were, at the time of coming into the jurisdiction of the United States, owned in whole or in part by a corporation, citizen, or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof:

(Here is set forth a list of vessels.)

"It is therefore ordered that through the United States Shipping Board *there be taken over to the United States the possession and title of the aforementioned vessels.* The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease, or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes

of the joint resolution above set forth. (Italics counsel's.)

Woodrow Wilson.

The White House, June 30, 1917."

The only respect in which any other Proclamations taking ships differs from the foregoing is that in some of them the agency appointed to take over the ships was the Navy Department instead of the Shipping Board.

The Demurrer (R. 6) is in the following words:

"Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States."

For the grounds of its decision in this case the Court referred in its Memorandum (R. 6) to its opinion in the case of *Deutsch-Australische Dampschiffs-Gesellschaft v. U. S.*, printed at p. 7 of the Record in this case. By reference to this opinion it appears that the reasoning upon which the Court reached the result stated was that appellant's claim was not founded upon the Constitution or a law of Congress, and that it was sustainable, if at all, only upon the theory of implied contract. This theory is rejected upon the reasoning that "Manifestly the Joint Resolution was an exercise of the war power of Congress. It finds support in the Constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water." In support of this reasoning, reference is made to powers granted the Alien Property Custodian under the Trading with

the Enemy Act, (40 Stats. 411), and to the doctrine that Congress has power to confiscate enemy property, and the exemplification of that doctrine afforded by cases arising out of incidents of the Civil War. Further support is sought by reference to cases arising out of incidents of the Spanish War, in which the seizure of enemy vessels in enemy waters by our Naval forces in the course of hostile operations was held not to give rise to a right to compensation.

Specification of Errors.

The error complained of is that the Court of Claims held that it was without jurisdiction to hear and determine appellant's claim, whereas it should have held that it had jurisdiction under sec. 145 of the Judicial Code. (36 Stat. 1136).

Summary of Appellant's Argument.

Appellant's argument will proceed along the following lines:

Affirmatively.

I. The taking of the ships was, in essence, an exercise of the power of eminent domain.

II. Such being the case, a right to compensation arises as matter of law, finding support in the Constitution, in the Joint Resolution of May 12, 1917, and in the theory of implied contract.

III. As there is a right to compensation, there is jurisdiction in the Court of Claims under Section 145 of the Judicial Code to entertain a suit to determine its amount.

IV. These propositions, undeniably true if the property taken had been owned by a citizen, are, in the circumstances of this case, no less true because the owner at the time of the taking was an alien enemy.

By Way of Negation.

To meet a defense asserted by the United States in the Court below but unnecessary to be decided there because that Court declined to assume jurisdiction, appellant will also argue.

V. The Peace Resolution of July 2, 1921, and the Treaties of Berlin and Versailles do not destroy appellant's right nor bar its remedy.

As the outline indicates, the argument, down to the end of Point III, will assume that the rights of appellant are precisely what they would have been had appellant been a citizen instead of an alien enemy.

In Point IV an endeavor will be made to show that this assumption is justified.

Point V deals only with the proposition that the Peace Resolution and Treaties entered into since the taking have not deprived appellant of any rights to which the taking gave rise.

ARGUMENT

I

The taking of the ships was, in essence, an exercise of the power of eminent domain, possessed by every government over all property found within its dominions, regardless of its ownership, if it is required for public use.

The ships were either expropriated, or they were confiscated. The Court of Claims in its opinion

(R., p. 13, last par.) suggests a middle position, rested solely upon appellant's enemy status. It says: "We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States should at some time account for the vessels or their ascertained value." Neither the Joint Resolution authorizing the taking, nor the Proclamation accomplishing it warrants such a suggestion. If it is finally adjudged that the Court of Claims is without jurisdiction to entertain this suit, the effect of the adjudication, in a practical sense, will be that the ships were confiscated; because, while the owners could still apply to Congress for relief, action by Congress would be a matter of grace and favor—it is only in courts that rights can be asserted.

The middle position assumed by the Court below runs contrary to the law as expounded by this Court in *Brown v. U. S.* (1814) 8 Cranch 110 (see especially p. 125), which is to the effect, broadly speaking, that judicial decrees of a confiscatory character, or having a confiscatory result, can be entered only if authorized by some law existing at the time of the fact occurrences. The decision of the Court below embodies the untenable theory that into the decision of the case there may enter not only law existing at the time of the fact occurrences but law that may be enacted in future.

In support of the proposition that the ships were not confiscated, but were taken by way of eminent domain, appellant relies upon:

(a) The text of the Joint Resolution.

(b) The manner of the taking of the ships by the Executive Department.

(c) The debates in Congress at the time of the adoption of the Resolution.

(d) The utterances of executive officers of the Government then and since.

(e) The general public policy of the country, as disclosed by the writings of its statesmen and publicists, the decisions of its courts and the acts and declarations of its executive officers, all of which are of such a character as to warrant the observation that an intention on the part of the United States to confiscate enemy property will never be presumed, but, if claimed, must be clearly proven.

(f) Treaties at the time existing between the United States and Germany, and judicial decisions concerning the interpretation of Treaties. (The reference to the Treaties is merely for the purpose of showing one reason why Congress enacted a compensatory law and throwing light upon certain utterances by Congressmen and by the President. No right of action founded upon the Treaties is asserted.)

(g) The attitude of the United States respecting Articles 1 and 2 of the Sixth Convention adopted by the Second Hague Conference (1907).

These various sources of authority are analyzed or elaborated as follows:

I (a)

Inferences from text of Joint Resolution.

The text of the Resolution clearly indicates that property acquired by the United States under its provisions is to be paid for. This statement is supportable on several grounds.

First—The word "confiscation" is nowhere employed in the Resolution, nor is any word of like or similar meaning. This fact is of great weight when it is recalled that Congress, on the only occasion when it authorized the confiscation of enemy property, declared its purpose in express and clear terms. The reference is to the Act of July 17, 1862 (12 Stat. 589). This Act was entitled "An Act to suppress insurrection, to punish treason and rebellion, *to seize and confiscate the property of rebels,* and for other purposes." The body of the Act, in the most explicit language, authorized confiscation, *and declared it to be the duty of the President to set in motion the procedure provided by the Act, for effecting confiscations by judicial decree.*

Second—The manifest purpose of the Joint Resolution was to provide the United States with facilities if needed, by enabling the Government (a) to acquire "immediate possession and title" of any vessel affected by the Joint Resolution, and (b) to "operate, lease, charter and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise." (So far as coastwise service is concerned, the Resolution was necessary as an enabling measure. Without it these ships, being foreign-built, could not have been operated coastwise. See Act of August 18, 1914, c. 256, sec 1, 38 Stat. 698.) The President is not *directed* or *required* to take title. He is simply *authorized* to do so. So, also, he is simply *authorized,* not directed or required, to put the ships into service. If in the exercise of his judgment he had refrained from taking title, or, after taking title had refrained from

putting the ships into service, it could not be said that he had violated any mandate imposed upon him by Congress; so likewise if he had taken some ships and refrained from taking others (as a matter of fact the records show that he took some at one time and others not until a considerably later date.)

In all this it is apparent that the acquisition of facilities was the purpose in view, and not the infliction of injury upon the enemy—for had such been the intention the authority given the President would have been mandatory and not merely permissive.

Third—The powers granted by the Resolution are so broad as to apply not only to ships then enemy owned (i. e., German owned—we were not yet at war with any other nation), but to ships owned by the nationals of friendly neutrals, of governments associated with us in the war, and even by American citizens. The condition which subjected a ship to expropriation under the Resolution related to her ownership, flag or registry at the time she came into our jurisdiction (i. e., with regard to claimant's ships, July-August, 1914). *German ownership at that time of the smallest share or fractional interest subjected the whole ship in* 1917 *to the exercise of the powers granted the President by the Resolution, regardless of where the ownership might lie in* 1917. The same is true as to flag or documentation, regardless of ownership. If these were German in 1914 the ship was subject to expropriation in 1917, regardless of changes in flag or documents in the interim.

By way of showing the broad scope of applicability of this Joint Resolution, reference will be made to

certain illustrative instances. German ships coming here in 1914 were purchased by Americans in 1915 under authority of an act of Congress of August 18, 1914 (c. 256, sec. 1; 38 Stat. at L. 698), and put under American registry and sent out as merchant ships. (See Life and Letters of Walter H. Page, by Burton J. Hendrick, Doubleday, Page & Co., 1922, vol. 1, p. 392-394, referring to the "Dacia.") Such vessels as the "Dacia", had she not been captured as prize, as she was by the French before we entered the war, would have been subject to expropriation under the Resolution. In a case now before this Court there are involved three vessels taken under the terms of this Joint Resolution, although they had been American owned and under American registry and flag since 1913 (*Atlas Line S. S. Co. v. U. S.*, Oct. Term, 1925, No. 111).

The Austrian steamer "Martha Washington" was requisitioned on August 31, 1917, although no state of war then existed between the United States and Austria. Later (May 11, 1918) title was taken under the Resolution. The United States afterwards paid compensation for her use down to the date of taking title, although, for a part of the use period (*i. e.*, December 7, 1917—May 11, 1918) we were actually at war with Austria. See Record of Hearings before House Committee on Merchant Marine, 66th Congress, 3d Session, December 15, 1920, re bill H. R. 14985. See also Minutes of U. S. Shipping Board of April 16, 1920, for Resolution re Compensation for S. S. "Martha Washington," which is of such importance that it is quoted in full as follows: (Italics are counsel's.)

"Whereas, On August 31, 1917, the United States

Shipping Board requisitioned the vessel MARTHA WASHINGTON, a passenger steamship of 8312 tonnage, then owned by Cosulich Societa Triestina di Navigazione, a corporation organized in Trieste, Province of Litorale, Austria; and

"Whereas, At the time of said requisition, the MARTHA WASHINGTON *had Austrian registry and flew the Austrian flag,* and was lying at the port of New York; and

"Whereas, The said Cosulich Societa Triestina di Navigazione claims to be in fact an Italian Corporation, and seeks to have the said MARTHA WASHINGTON reconveyed and recover compensation for its use while under the jurisdiction of the United States; therefore be it

"Resolved, That at the time the MARTHA WASHINGTON was requisitioned said vessel had the status of a *neutral vessel subject to requisition* by the United States Shipping Board under the power delegated to said Board by the President of the United States, which authority was vested in the President by an act of Congress, the Board has no authority to reconvey the said vessel to the Cosulich Societa Triestina di Navigazione, regardless of whether or not said corporation may at the present time be entirely Italian in character and purpose; and be it

"Further resolved, That the *claimants be remitted to the State Department to establish their Italian citizenship as a* prerequisite to the delivery of the vessel and compensation therefor after May 11, 1918; and be it

"Further resolved, That the recommendations of the Requisition Claims Committee that the award

of compensation for the use of said vessel during the period it was in use under the Requisition Order of August 31, 1917—from August 31, 1917, to December 7, 1917, be fixed at $219, 436.80, from which should be deducted the cost of repairs effected by the United States Navy, and the time required to make same, and further, that *just compensation for the use of said vessel from December* 7, 1917, *until the United States took over possession and title of said vessel on May* 11, 1918, *in accordance with Executive Order No.* 2859-*A be fixed at* $352,013.20, be, and they are hereby approved; and be it

"Further resolved, That the Disbursing Officer of the United States Shipping Board be, and he is hereby authorized *to pay the amount awarded to the claimant* upon securing the consent of the Alien Property Custodian thereto; and be it

"Further resolved, That pending receipt of information from the Navy Department with respect to the cost of the repairs and the time required to effect the same, the claimant be required to guarantee the payment thereof; and that the State Department be advised of this guarantee in order that it may be enforced before redelivery of the MARTHA WASHINGTON is effected, in the event the claimant establishes his right thereto."

This situation is referred to at such length for the support it lends to the following observations:

(a) The fact that the Resolution authorized the United States to take title to neutral, allied and American-owned and registered vessels, no less than German-owned vessels, leads inevitably to the conclusion that it was intended that vessels taken should be paid for. It is impossible to hold that Congress

intended to authorize the taking of the ships of a neutral, an ally or a citizen without compensation. It is equally impossible for the court to apply one rule to the ships of such persons and another rule to enemy ships. To make such a distinction would lie only in the power of Congress, and Congress has laid down one rule for all.

(b) The Executive Department of the Government has recognized that no distinction was made between enemy and non-enemy ships, in paying the sum of $352,000 for the use of the Austrian ship, "Martha Washington," from the date of the declaration of war with Austria on December 7, 1917, to the date when title to the ship was taken on May 11, 1918. (See Shipping Board Resolution, *supra.*)

(c) Recognition of the right of the owners of the "Martha Washington" to be paid compensation for her use during that part of the period of the war with Austria that preceded the taking of title, constitutes an admission of their right to recover compensation for the property of which they were deprived when *title* was taken. Reason and justice do not justify taking a *title* without compensation, when the right to be compensated for *use* prior to the taking of title is recognized. Of course, also, if Austrian enemies are entitled to be compensated, German enemies are equally entitled. No ground exists for distinguishing between the two, and if power to make an arbitrary distinction may be claimed to exist anywhere, it could be only in Congress, which has not attempted any distinction.

One feature of the Martha Washington case deserves special mention. It was admitted that the ship was of Austrian flag and registry, that the cor-

poration owning her was an Austrian corporation and that its managing directors and majority stockholders were Austrian subjects. It was asserted, however, that the corporation was organized and controlled "by those who were of Italian blood and Italian sympathy, although underlying that they were subject to the domination of Austria until this portion of Italia Irredenta was redeemed" (Report of House hearing, *supra*, especially page 5; Shipping Board Resolution, *supra*). The Shipping Board resolution shows that this claim was treated as immaterial in the making of the award for compensation. The Resolution orders: "that the claimants be remitted to the State Department to establish their Italian citizenship as a prerequisite to the delivery of the vessel and compensation therefor after May 11, 1918" (i. e., after date of taking title). And, entirely disregarding this claim and dealing with the steamer as an Austrian vessel, the Board found: "that just compensation for the use of said vessel from December 7, 1917," date of declaration of war against Austria) "until the United States took over possession and title of said vessel on May 11, 1918, in accordance with Executive Order No. 2859-A be fixed at $352,013.00***." That is to say, the Board awarded compensation for the use of the vessel during that part of the Austrian war period which preceded the taking of title, although conceding that she was an Austrian —hence, enemy-owned ship.

(No distinction exists between a "requisition" and a "condemnation." Judge Smith in U. S. District Court for the Eastern District of South Carolina in *Filbin Corporation v. United States,* 266 Fed. Rep. 913, referring to the language of the Fifth Amendment said:

"Nothing is said about 'requisition' or 'condemnation'; the word used is 'taken.' The result of either condemnation or requisition is *a taking,* and therefore, in the opinion of the court, this amendment applies to the taking of private property, whether it be by requisition or by condemnation; and both requisition and condemnation being exercised by virtue of the same provision of constitutional law, commonly called 'eminent domain,' which allows the interest of the individual to be subordinated to that of the public, and private property to be taken compulsorily for public use, in the opinion of the court, under the Constitution of the United States, there is no difference between a 'requisition' and a 'condemnation,' so far as the obligation of the United States is concerned, to award to the owner just compensation.")

Fourth—Sec. 2 of the Joint Resolution reads as follows:

"Sec. 2. That the Secretary of the Navy be, and he is hereby authorized, and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

This affords conclusive evidence of an intention to pay compensation. If not, why provide for appraising the vessels? Why give to the appraisal the char-

acter of "competent evidence in all proceedings on any claim for compensation?" Why, when Sec. 1, authorizing takings, is permissive only, should Sec. 2, providing for valuation, be *mandatory,* unless Congress intended that the permissive authority, if availed of, should give rise to a corresponding right to compensation?

Fifth—That the obligation is an implied rather than an express one does not detract from its strength. The approach of the war emergency was productive of other legislation authorizing seizure of property for public use that did not expressly call for payment but under which, nevertheless, compensation was paid. The immense payments made by the Government for the use of the railways during the war afford an example. The possession, operation and control of the railway systems of the country was taken over by the Government from about January 1, 1918, to March 1, 1920, under an Act of Congress which contained not a single word relating to compensation. The act reads (Act of August 29, 1916, 39 Stat. at L. 645):

> "The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

It is true that legislation passed at a later date did promise compensation and afford a measuring stick

to determine its amount and (as the Court below remarked, Op., R. 12) a forum in which to enforce payment. But *A. W. Duckett & Co., Inc. v. U. S.*, 266 U. S. 149, demonstrates that a right, a measure, and a forum existed without this later legislation. The property that formed the subject matter of the *Duckett* case was taken under the Act cited and the later legislation (Act March 21, 1918, 40 Stats. 451) did not apply to property of that kind, but only to railroads, nevertheless this Court held that Duckett & Co. had both a right and a forum.

Comparison with other legislation of the war period demonstrates that when Congress intended to refrain from committing the country to any obligation of payment, it did not lack the faculty of expressing such intention clearly. The Trading with the Enemy Act of October 6, 1917 (40 Stat. at L. 423, at 424; Fed. Stat. Ann., Sup. 1918, p. 862, at 863, sec. 12), provides (last par. of sec. 12) that

> "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

By this provision Congress reserved to itself the right to deal with the great mass of enemy property ashore, passing to the Government under the Act of October 6, 1917, in the light of the developments of the war and of conditions existing at its close.

The omission of a similar reservation with respect to the values of the seized ships, although it was expressly directed that they should be appraised, is significant, as indicating that Congress advisedly framed

the ship measure in such manner as to make it carry an obligation to compensate.

These arguments had no effect upon the Court below, because, in its view (Opinion, R. 9, 3d par.) "Manifestly the Joint Resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water."

It is respectfully submitted that this statement only begs the question, and that it is not supported by reason. In the attempt to ascertain the character of any legislative act, the first thing to be done is to examine the act itself. The Joint Resolution in question *negatives* rather than *manifests* the theory that it constitutes an exercise of the war power or finds support in the constitutional provision relating to declarations of war and rules concerning captures. It does not speak of confiscation. It does apply to ships which at the time of its passage were not owned by enemies, and with regard to all the ships affected by it, including those enemy owned, it required an appraisal of value, which is to be "considered as competent evidence in all proceedings on any claim for compensation."

The Court below supports its observation that the Joint Resolution was an exercise of the war power by reference to cases in which this Court has held that the Trading with the Enemy Act was an exercise of the war power. But no true analogy exists between this Joint Resolution and the Trading with the Enemy Act. The Trading with the Enemy Act, as originally conceived, was purely a conservation measure, and sales of property taken under that Act were per-

mitted only to prevent waste. When, later, by amendment, sales were authorized in any case, the Act still remained a conservatory measure with respect to the proceeds arising from such sales. The Court below said that if the ships had not been taken under the Joint Resolution they "could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." *True, but neither would there have been any title in the United States;* and had a sale subsequently taken place, whether the United States or another were the purchaser, the money realized at the sale would, under the Trading with the Enemy Act, have had to be deposited with the Alien Property Custodian or with the Treasurer of the United States, and in such custody would have been the property of the ship owner, subject only to the reservation contained in Section 12 of the "Trading with the Enemy Act, set forth above.

Moreover, the Trading with the Enemy Act was not passed until October 6, 1917, while the ships were taken in June, 1917.

I (b)

The manner of the taking of the ships by the executive department of the government demonstrates that the taking was an expropriation, not a confiscation.

The taking was in strict accord with the provisions of the Joint Resolution of May 12, 1917. The President issued a Proclamation (See supra, p. 6) quoting the Joint Resolution, reciting the presence in our waters of ships to which its terms applied, and

ordering them to be "taken over" to the United States in possession and title, agreeably to the terms and "to accomplish the purposes" of the Joint Resolution. This negatives the possibility that any other source of power was relied upon than the Joint Resolution itself. Moreover, it is in harmony with ordinary eminent domain procedure in those states wherein, under the law, taking may precede payment, and due process of law is accorded the former owner by provision for notice to him, either actual or constructive, and his being given a right to maintain a suit against the public body to which title has passed, to establish and recover just compensation.

1 (c)

The debates in Congress prove that it was not by inadvertence, but by intention that the Joint Resolution was enacted in a form that created an obligation to pay compensation for the property rights of which the ship-owners might be divested.

The Court below, in its opinion, did not refer to the Debates. It did refer to the fact that, in course of passage, the Joint Resolution was reduced from one of five sections, the last three of which contained provisions relative to suits by the ship owners, to the one of two sections which was finally passed, and it said (Opinion, R. 13): "The Joint Resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize suits

in the Court of Claims on account of the seizure of these vessels." *But this reasoning is deprived of force by the fact that the statements made in the debate in the House were made after the amendment to which the Court of Claims thus referred; and it was of the Resolution in the form in which it was finally passed that members of the House said that it gave the ship owners a right to sue in the Court of Claims and that they must and would be paid.* The Debates in the House were on Senate Joint Resolution 42 (of 2 sections) substituted by amendment for House Joint Resolution 62 (of 5 sections). Congressional Record, Vol. 55, Pt. 2, p. 1900.

Believing that such an arrangement will better serve the Court's convenience, printed extracts from the debates on the Joint Resolution are printed as appendix A to this brief, and at this point are printed only short quotations.

Mr. Rowe of New York, speaking of the seizures authorized by the Joint Resolution, said (Cong. Rec. May 7, 1917, Vol. 55, p. 1919):

> "Such seizures are made in most of the States of the Union, and afterwards they settle the bill. We even take real estate in my State and afterwards condemn the property and find the value. It is done when the real estate is wanted and wanted immediately. Here is something that we want. We must have ships that can carry freight and soldiers from this country and Canada to Europe.
>
> *"There is no man in this House today that wants us to take advantage of the private citizens of the United States or the private citizens even of Germany. They must and will*

be paid. We do hold, however, that no money that is paid for these vessels should be transferred to any German citizen or to the German Government *before this war is closed.*"

Mr. Stafford of Wisconsin said (*Ibid,* p. 1919):

"I fully approve of the policy that is provided for in this bill for the Government to appropriate these foreign interned ships; but I also wish to advocate the duty of the Government to pay those rightful owners, whoever they may be, for the use of those ships."

Mr. Stafford also said (*Ibid, p.* 1919):

"That principle is akin to that providing compensation for these interned ships; that being interned here, the owners not having the privilege of leaving port except by rushing into the jaws of destruction, are entitled to have their rights conserved and recognized in the courts of this country. And I make this claim, that if Germany accords our citizens in their courts the same right to sue the Government as is accorded aliens in the Court of Claims, if she accords them reciprocal rights, then these foreign subjects, upon the seizure of their property, have the right to go into the Court of Claims and prosecute their claim for indemnity or for the return of the property."

Mr. Bankhead of Alabama interrupted Mr. Stafford (*Ibid, p.* 1920) to ask whether the Joint Resolution involved a denial of the principle that compensation should be paid. Mr. Stafford replied (*Ibid,* p. 1920):

"The bill provides, in section 2, for the means whereby the Secretary of the Navy may

appraise the property that is taken over and says that that appraisal shall be considered as competent evidence in all proceedings hereafter authorized in any claim for compensation. That rather presupposes that some person somewhere will make a claim for damages."

Mr. Hardy of Texas remarked (*Ibid*, p. 1921):

"This bill simply sets in motion the power of eminent domain of the Government to take the property of an alien or of a citizen, and the Government has the right in a case of public necessity arising from war to take over the property of its own citizens, and certainly no less the property of any other resident human being within its borders."

Mr. Small of North Carolina said (*Ibid*, p. 1922):

"I am in favor of this bill which appropriates the interned ships of Germany, with which we are at war. I think it can be justified upon the ground of emergency and necessity, but at the same time I do not believe there should remain the slightest question that there should be compensation to the owners of these ships to the extent of their value as of the present time."

Mr. Edmonds of Pennsylvania remarked (*Ibid*, p. 1923):

"We take the ships. We have arranged to leave the question of compensation open. The treaty is here. Undoubtedly all those questions will be brought up when this case will be adjudicated in the Courts of Claims, where they have a right to take it."

* * * * *

> "I think we can afford to pass this resolution and leave it to the court to pass upon in due time what we are to pay for these ships."

Mr. Hadley of Washington, speaking of the appraisal provided for by Sec. 2, said (*Ibid*, p. 1924):

> "It is to be preserved, and to be submitted in any court of competent jurisdiction that may deal with that subject. That is expressly provided by the resolution."

Concerning all that was said in the House, as printed in Appendix "A" hereto, it is believed to give full support to the following propositions:

(a) That Congress *intended* that the ship owners affected by the Joint Resolution, enemy no less than neutral, should be compensated for their seized ships.

(b) That the opinion was held, with practical unanimity, that the Resolution as passed gave rise to an absolute right to compensation.

(c) That the House evidently believed that the Joint Resolution, without anything more, was sufficient to give the Court of Claims jurisdiction, and to give the ship-owners access to that Court, once the war should be over; despite the Senate's excision of the last three paragraphs of the original House Resolution.

I (d)

President Wilson, a member of his cabinet, an official of the State Department under his administration, and also former Secretary of State Hughes, acting in a private capacity, have all given utterance to statements which stamp the Joint Resolution as one which imposed upon the government the obligation to pay compensation.

In his War Message of April 2, 1917, the President said:

> "We have no selfish ends to serve. We desire no conquests, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make.

President Wilson also said that:

> "The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title." (Garner's International Law I, p. 168).

On April 12, 1917, Secretary of the Interior Lane wrote to Mr. Frank I. Cobb, Editor of the New York World, as follows:

> "I am in favor of taking all the German ships under requisition, paying for their use eventually, but this is a matter of months." (See the letters of Franklin K .Lane, Houghton Mifflin Company, 1922, p. 245).

And on April 15, 1917, he wrote to his brother George W. Lane:

> "We, of course, are going to press into service at once the German and Austrian ships, such of them as can be repaired and will be of use in the freight business, but we will not confiscate them. We will deal with them exactly as we will deal with American ships, paying at the end of the war whatever their services were worth. This spirit of fairness is to animate us throughout the war." (*Ibid*, p. 246.)

The development from the Cabinet Minister's proposal of April to Congress' Act of May is interesting. Mr. Lane proposed *a requisition for use, with compensation,* which finds clear authority in Articles 1 and 2 of the Sixth Hague Convention (infra Ig,) Congress finally decided upon and enacted an eminent domain measure which resulted in the acquisition of title instead of the mere temporary right to use, and, of course, involves legal obligation to pay compensation.

The Department of State, over the signature of Van S. Merle-Smith, and under the date of December 8, 1920, addressed to Senator Lodge, Chairman of the Foreign Relations Committee of the Senate, a letter relating to the Austrian steamship "Martha Washington." This letter was used by the Hon. Charles E. Hughes, afterwards Secretary of State, in his argument addressed to the House Committee on the Merchant Marine and Fisheries, 66th Congress, 3d Session, December 15, 1920, as counsel for the owners of the former Austrian S. S. "Martha Washington" and is printed in full in the record of said hearing. In this letter Mr. Merle-Smith said:

> "The joint resolution of May 12, 1917, which authorized the seizure of the vessel, contemplates the payment of compensation."

The record of the above-mentioned hearing also contains on p. 17 the following colloquy between Mr. Hardy of Texas, a member of the Committee, and Mr. Hughes.

> "Mr. Hardy—* * * As I understand it, under international law, the private property, and justly so, of a private citizen of a country

which may get into war with us, is really sacred.

"Mr. Hughes—And ought to be."

I (e)

From the beginnings of the United States until the present time, its public policy, with regard to the treatment of enemy property, has been such that an intention to confiscate can never be presumed, but, if alleged, must be clearly shown to exist.

During the Revolution the Continental Congress did not enact any confiscatory measures. Some of the States did. The Treaty of Peace between the United States and Great Britain, of September 3, 1783 (Treaties and Conventions Between the United States and Other Powers, Government Printing Office, 1889, p. 375), provided that Congress should recommend to the Legislatures of the several States to provide for the restitution of all property rights of British subjects that states had confiscated. Some years later the United States concluded the Jay Treaty with England, and the treatment of enemy property became the subject of widespread public discussion. In this Alexander Hamilton was the leading protagonist of the view that enemy property should not be subjected to confiscation. Hamilton wrote his "Camillus Letters" about 1795, principally for the purpose of persuading the country to adopt, for that time and the future, the policy of extending protection to the property of aliens found within our borders if by the accident of circumstance our Government and theirs should come to be at war. From the "Camillus Letters" is quoted the following:

"XVIII. No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation.

"It would have been an inestimable gem, in our National Constitution, had it contained a positive prohibition against such a practice, except, perhaps, by way of reprisal, for the identical injury on the part of another nation.

"There is, indeed, ground to assert, that the contrary principle would be repugnant to that article of our Constitution which provides, that 'no State shall pass any law impairing the obligation of contracts.' The spirit of this clause, though the letter of it be restricted to the States individually, must, on fair construction, be considered as a rule of the United States; and if so, could not easily be reconciled with the confiscation or sequestration of private debts in time of war. But it is a pity that so important a principle should not have received an express and direct sanction.

"XIX. The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there; it tacitly promises protection and security.

"There is no parity between the case of the persons and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice;

there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery. In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice, or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force.

"Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscaton of a property, which, during peace, serves to augment the resources and nourish the prosperity of a state?

"The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for its deprivation?"

The country's early jurists were equally outspoken against the policy of confiscation.

In *Brown v. U. S.*, 8 Cranch, 110, Chief Justice Marshall, while admitting that the sovereign (that is to say, in our country, the Congress) had the power to pass confiscatory measures, did not refrain from condemning the exercise of the power. Concerning it he says (p. 128 of 8 Cranch).

> "* * * The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although *it cannot be disregarded by him without obloquy,* yet it may be disregarded." * * * (Italics counsel's.)

In the same case, Mr. Justice Story wrote a dissenting opinion, but on the point in question, of the evil policy of confiscating enemy property, he was in agreement with the majority of the Court. Referring to the "Camillus Letters," Nos. 18 to 23, Judge Story says (p. 141 of 8 Cranch):

> "* * * I admit, in the fullest manner, the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure not as of strict right, *but as of sound policy and national honor, I have no hesitation to say that the argument is unanswerable.* He proves incontrovertibly what the highest interest of nations dictates with a view to permanent policy; but I have not been able to perceive the proofs by which he overthrows the ancient principle," (that is, that enemy property was formerly subject to confiscation).

He further says (p. 145 of 8 Cranch):

"* * * I am not bold enough to interpose a limitation where Congress have not chosen to make one; and I hold, that, by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved. It will be at once perceived that in this doctrine I do not mean to include the right to confiscate debts due to enemy subjects. *This, though a strictly national right, is so justly deemed odious in modern times, and is so generally discountenanced that nothing but an express act of Congress would satisfy my mind that it ought to be included among the fair objects of warfare.* * * * " (Italics counsel's).

(N. B. The majority opinion held that *Congress alone, not the President,* has the power in any case.)

And Chief Justice Marshall, speaking for the majority in the *Brown* case, asserts that there is no distinction in reason between debts and credits and other forms of property. At p. 123 of 8 Cranch he says:

"Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction."

Brown v. U. S. was decided in 1814. The case of *Percheman v. U. S.* came before the court in 1833 and again the majority opinion is written by Marshall, and in it he says, concerning the results upon private property of the transfer of dominion:

"It may not be unworthy of remark that it is very unusual, even in case of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the

country. *The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled.*" (Italics counsel's) (*U. S. v. Percheman*, 7 Peters 51, at foot of p. 86).

It is submitted that this remark applies with at least equal force to the idea of the confiscation of ships that took refuge from the enemy in the ports of a country then a neutral, but which afterwards became a belligerent, and the more so as there existed between the two governments a Treaty providing that "If the citizens or subjects of either party, in danger from * * * enemies, shall take refuge, with their vessels or effects, within the harbors or jurisdiction of the other, they shall be received, *protected*, and treated with humanity and kindness * * *" (Art. XVIII of Treaty with Prussia of 1799, infra p. 40).

At the present stage of the argument the *Brown* and *Percheman* cases are referred to solely for the support they give to the proposition that the *policy* of the United States is so opposed to confiscation that he who claims that confiscation is intended in a given case is put upon proof to support his claim.

Professor John Bassett Moore, at p. 308 of Vol. 7 of his Digest of International Law, after reviewing numerous authorities, says:

> "Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:
>
> " 'Property belonging to an enemy which

is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, *may be said to enjoy a practical immunity from confiscation.'"* (Italics counsel's).

In further support of the proposition that confiscation is not to be presumed, we quote the following extract from the speech delivered by Secretary of State Hughes at Philadelphia on November 30, 1923. Mr. Hughes, referring to Latin America, said:

"States have duties as well as rights. Every State on being received into the family of nations accepts the obligations which are the essential conditions of international intercourse. Among these obligations is the duty of each State to respect the rights of citizens of other States which have been acquired within its jurisdiction in accordance with its laws.

"A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful co-operation is possible.

"Each State may have its code of laws in accordance with its conception of domestic policy, *but rights acquired under its laws by citizens of another State it is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles.*" (Italics counsel's.)

In the concluding paragraph the Secretary only repeats in other words the thought expressed by

Hamilton when ("Camillus Letters" XVIII) he denounced:

> "The idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation."
>
> And when ("Camillus Letters" XIX) he asserted that:
>
> "Whenever, therefore, a Government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security."

Attorney General Daugherty in 1923 uttered officially the opinion that confiscation is contrary to the policy of the United States. From his brief in *U. S. v. Chemical Foundation* (District Court, Delaware, 1923, 294 Fed. 300) the following extracts are quoted:

> "* * * Confiscations of the private property of the enemy have met the universal disapprobation of the civilized world for nearly two hundred years." (p. 156.)
>
> "9. It is to be presumed that Congress, by the amendment of March 28 (to the Trading with the Enemy Act), did not intend to violate the 'law of nations' by authorizing confiscation of enemy property, unless the act clearly so directs." (p. 196).
>
> "That public opinion of the civilized world has been against the confiscation of private property of the enemy in time of war for at least two centuries, up to the termination of the World War, is universally recognized." (p. 198.)

> "With the growth of Christianity, the practice of enslaving the defeated enemy gradually disappeared, but the practice of seizing his property continued. It early developed that the seizure must inure to the benefit, not of the individual members of the victorious army, but to the sovereign power of the nation. Then with the growth of commercial intercourse and with the progress of civilization, the idea that both the person and the property of the individual enemy was free from confiscation, although both might be arrested or impounded as a measure of safety during the war developed." (p. 202.)
>
> "* * * The policy of the United States and the modern policy of all civilized nations has forbidden the exercise of the power, which is admitted to exist in Congress, to confiscate alien property seized on land outside of the miltary zone in time of war." (p. 574.)

And to demonstrate that the confiscation Acts of the Civil War period, properly understood, do not contradict the assertions just quoted, the Attorney General said (*Ibid.* p. 204):

> "* * * The purpose of all these acts was to punish American citizens for acts of disloyalty, and although they were later sustained on the doctrine of seizure of enemy property, the legislation cannot be cited as a precedent for confiscation of enemy property during the war just ended."

The public policy evidenced by this mass of authority is set at naught by the Court below disclaiming jurisdiction, although refusing (Opinion, Record p. 13, last par.) to adjudge the Joint Resolution a confiscatory measure. Earlier in the opinion (Rec-

ord p. 9, first par.), it had justified its disclaimer of jurisdiction by saying that the Joint Resolution "does not in terms declare a liability of the Government or of itself create a right in plaintiff." It is clear, however, especially since the decision of this Court in *A. W. Duckett & Co., Inc. v. U. S.* 266 U. S. 149, that an Act may create a right in plaintiff and vest jurisdiction in the Court of Claims without *"in terms* declaring a liability of the Government." The Act involved in the *Duckett* case neither promised compensation nor conferred jurisdiction on the Court of Claims, but this Court held that a taking pursuant to the Act created a right to compensation of which the Court of Claims must take cognizance under Section 145 of the Judicial Code.

1 (f)

A compelling reason for Congress to enact a compensatory measure is found in the treaties existing in 1917 between the United States and Germany, and the decisions of the Supreme Court relating to the effect of war on treaties, in that these show that good faith required the payment of compensation.

(The Treaties are referred to, not as a foundation for the suit, but only to show a reason why Congress legislated in such manner as to give a right of action.)

Article XII of the Treaty of Commerce and Navigation between the United States and Prussia of 1828 (Treaties and Conventions of the United States and Other Powers, Government Printing Office, Washington, 1889, p. 915) revives Articles XIII to XXIV, inclusive, of the Treaty of 1799 with Prus-

sia (*Ibid*, p. 917), with the exception of the last paragraph of Article XIX, which is not pertinent to this discussion.

Among the Articles of the Treaty of 1799 thus revived are the following:

"ARTICLE XVIII.

"If the citizens or subjects of either party, *in danger from* tempests, pirates, *enemies,* or other accidents, *shall take refuge, with their vessels or effects,* within the harbors or jurisdiction of the other, they shall be received, protected and treated with humanity and kindness, and shall be permitted to furnish themselves, at reasonable prices, with all refreshments, provisions and other things necessary for their sustenance, health and accommodation, and for the repair of their vessels. (Italics counsel's.)

"ARTICLE XXIII.

"If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance; and all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen, unarmed and inhabiting unfortified towns, villages or places, *and in general all others whose occupations are for the common subsistence and benefit of mankind,* shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted

by the armed force of the enemy, into whose power by the events of war they may happen to fall; *but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.* (Italics counsel's.)

"ARTICLE XXIV.

"* * * And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be sacredly observed as the most acknowledged articles in the law of nature and nations."

The German Empire succeeded to the rights and duties of Prussia under these treaties.

North German Lloyd v. Hedden 43 Fed. R., 17, *Disconto Bank v. Umbreit,* 208 U. S. 570; 52 L. Ed. 625; *Terlinden* v. *Ames,* 184 U. S. 270; *Foreign Relations* 1883, p. 369; *Ibid* 1885, p. 404 at 443-4; *Ibid* 1887, p. 370; *Ibid* 1895, pt. 1, 583. *American Journal of International Law,* Vol. IX (1915), p. 952.

Under the decisions of this Court these treaties were not abrogated by the outbreak of war with Germany. In *Society, etc., v. New Haven,* this Court declared (p. 494 of 8 Wheaton).

"There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, *or which, in their terms, are meant to provide for the event*

> *of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war.*" (Italic counsel's.)

And further:

> "We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended, while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

And in the same case the Court also held that even if a treaty is abrogated, private rights previously vested under it are not thereby destroyed or impaired.

In the case cited the Society was a British corporation and its rights to certain lands in Vermont were recognized and confirmed by the provision of the Treaty of Peace between this country and Great Britain, following the Revolution, which is cited in a subsequent part of this brief. Later an effort was made to divest it of these lands under a State statute, and it was contended that as a result of the War of 1812 the Treaty of 1793 was abrogated in certain respects, including those provisions under which the Society asserted its vested property rights. This Court states the contention and answers it in the following words (p. 492 of 8 Wheaton):

> "The last question respects the effect of the late war between Great Britain and the United States, upon rights existing under the treaty

> of peace. Under this head, it is contended by the defendants' counsel, that although the plaintiffs were protected by the treaty of peace, still the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived under it, unless they had been revived and preserved by the treaty of Ghent."

Here the Court states an argument not germane to the present case and then proceeds:

> "But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot divest rights of property already vested under it.
>
> "If real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more effects such rights than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents, be repealed, it has never been supposed that rights of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests."

This reasoning applies no less to property in ships than to property in land.

Congress knew, when it was debating the Joint Resolution, and the President knew when he announced that the United States would not take advantage "of a state of war to take possession of property to which international understanding and the recognized law of the land give it no just claim or title" that the treaties and the decisions just referred to existed. They knew that the treaties

guaranteed to the German shipowners protection for their vessels which had sought refuge in our ports (neutral at the time they entered) from an enemy. They knew that the shipowners, whose business of transporting persons and goods to and between all places on the face of the earth had always been considered an "occupation for the common subsistence and benefit of mankind" were entitled to freedom from molestation and compensation for anything necessary to be taken from them for the use of armed forces. They knew that this Court had declared that such a Treaty as this, providing for the very event of war, was sacredly binding, should that event occur; and that even if it were treated as abrogated, the private rights previously acquired by private persons in reliance upon its terms were not thereby affected. This knowledge explains the compensatory character of the Joint Resolution.

The strict interpretation which this Court in *Stoehr v. Wallace,* 255 U. S. 239, gave to that phrase of Art XXIIIof the Treaty of 1799 referring to "the merchants of either country *then residing in the other*" does not impair the force of the argument, for two reasons: first, the argument goes only to the intention of Congress, and the debates show that the intention was to pay for the ships after the war should be over (See Ic, supra); second, a separate and substantive provision of Art. XXIII includes ship owners in the general clause * * * " all others whose occupations are for the common subsistence and benefit of mankind", as to whom it is provided that "if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price." So does

Article XVIII specifically protect those who take refuge, with their vessels, in our harbors, from enemies.

I (g)

The American attitude relative to articles 1 and 2 of convention VI of the Second Hague Conference (1907) likewise called for the enactment of a compensatory measure, in order that acts should square with professions.

The Articles mentioned read as follows:

"*Art.* 1—When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Art. II—A merchant-ship unable, owing to circumstances of *force majeure,* to leave the enemy port within the period contemplated in the above Article, or which was not allowed to leave, cannot be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation."

(Foreign Relations of the U. S. 1907, Part 2, p.

1248; American Journal of International Law, 1908, Vol. 2, p. 128).

Had this Convention been adopted by the United States, it would have insured appellant's ships against confiscation, and would have insured the payment of compensation had they been requisitioned for use—for it may not be assumed that our Government would have violated the obligations of this Convention after once adopting it.

The United States, however, did not adopt this Convention. Our delegates* declined to sign it or to recommend its acceptance and it was never ratified by the Senate. The reason is stated in the Report of the American delegation to the Secretary of State (Foreign Relations, 1907, Part 2, 1144 at p. 1158). It is that the Convention did not go as far as the American delegation thought international law had already gone. The report states (in part):

> "The uninterrupted practice of belligerent powers since the outbreak of the Crimean war has been to allow enemy merchant vessels in their ports at the outbreak of hostilities to depart on their return voyages. The same privilege has been accorded to enemy merchant vessels which sailed before the outbreak of hostilities, to enter and depart from a belligerent port without molestation on the homeward voyage. *It was therefore the view of the American delegation that the privilege had*

*Joseph H. Choate; Horace Porter; Uriah M. Rose; David Jayne Hill. (American Minister at the Hague); Brig. Gen. Geo. B. Davis; Rear-Admiral Charles S. Sperry; William I. Buchanan; James Brown Scott; Chas. Henry Butler; Chandler Hale, Secretary; A. Bailly-Blanchard, Assistant Secretary; William M. Malloy, Assistant Secretary.

acquired such international force as to place it in the category of obligations. Such, indeed, was the view of a majority of the conference, but as the delegation of Great Britain adhered to the opinion that such free entry and departure was a matter of grace, or favor, and not one of strict right, the articles regard it as a delay by way of favor and refer to the practice as desirable." (Italics counsel's.)

And also:

"The convention also presents an undesirable alternative in the treatment of enemy merchant ships, in that it provides that in certain cases they may be seized 'subject to restoration after the war without indemnity' or to 'immediate requisition with indemnity.' As merchant marine commerce is carried on it is obvious that the condition of the cargo which is detained in indifferent or inefficient custodianship during the ordinary duration of war would approach confiscation."

The correctness of the view thus expressed by the American delegation is maintained in an article entitled "Status of Enemy Merchant Ships" contributed by Dr. James Brown Scott, technical delegate and expert in International Law of the American delegation, to the American Journal of International Law (Journal, 1908, Vol. 2, p. 259), wherein is set forth in detail the practice of the principal European powers in all their wars from that of the Crimea onward, as well as of the United States in the Spanish war.

Dr. Scott says (*Ibid,* p. 266):

"It is thus seen that in no less than five great wars of the last fifty years an exemption is

made in favor of enemy merchant vessels in port at the outbreak of hostilities, and that a longer or shorter period is fixed within which such vessels may safely leave their ports and proceed to their destination. Although the custom is modern, it cannot be said to be limited to any particular quarter of the world; for the states generally have recognized the exemption in these recent wars, not only in Europe and America, but also in Asia. Such a custom, however recent it may be, may rightly claim to form a part of the law of nations. It is therefore a source of regret that the Second Peace Conference refused to recognize it as a right but simply as a privilege, *a delai de faveur,* which may be accorded or refused at the option of the belligerent, and that the privilege was unaccompanied by any recommendation of a period of time within which the privilege in question should be accorded."

He concludes with this remark (*Ibid,* p. 270):

"The convention as a whole was a compromise between those who believed in the existence of a right and those who refused to recognize the legal validity of the custom which has grown up in recent years. As in most compromises the result is unsatisfactory. The convention cannot be called progressive, for it questions a custom which seems generally established and its adoption would seem to sanction less liberal and enlightened practice. The United States delegation therefore refused to sign the convention and its acceptance has not been recommended by the Department of State."

That our official delegates held such a view and our State Department approved it, would seem to

afford a sufficient reason for the enactment of a compensatory measure, especially as our Government had announced a sincere intention to wage war in accordance with the rules of International Law.

Recapitulation of Argument Under Point I.

The measures employed in taking title to these ships were, in their essence, of the character of eminent domain. This is established by the language of the Joint Resolution; the language of the proclamations evidencing the takings; the statements made in debates in Congress at the time of the passage of the Joint Resolution; the utterances and acts of executive officers of the Government then and since; and the policy of the country as disclosed by its political and judicial history extending from its foundation to the present day. A powerful reason for enacting a compensatory, rather than a confiscatory, measure is found in our Treaties with Prussia and in a proper desire to act in accordance with the principles we professed at the time of the Second Hague Conference.

II.

The taking having been by way of eminent domain, the owners are entitled as matter of law to compensation, the right finding support in the Constitution (Amendment V), in the Joint Resolution, and in the theory of express contract.

As to strict eminent domain proceedings.

When a taking of private property for public use is effected by formal eminent domain proceedings,

the right to compensation springing out of the taking is founded upon the Constitution. *Monongahela Nav. Co. v. U. S.* (1893), 148 U. S. 312; *Seaboard Air Line Railway Company v. U. S.* (1923), 261 U. S. 299.

In the *Monongahela Nav. Co.* case the statute authorized the taking of plaintiff's land, dam and lock, necessary to the exercise of its franchise to take tolls, but expressly provided that—

> "In estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated."

The trial court, in obedience to the statute, declined to admit evidence of the value of the franchise. This Court, holding that Congress lacked power to say "what shall be the rule of compensation," reversed the judgment and sent the case back for a new trial, in which the value of the franchise should be taken into account, saying, (at top of p. 328 of 148 U. S.):

> "We are not, therefore, concluded by the declaration in the Act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

and also, (last par. of p. 336 of 148 U. S.):

> "Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms

than that to establish postoffices and post roads; but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation."

In the *Seaboard Air Line Railway Company* case the question before this Court was whether the United States had to pay interest on the value of lands condemned under the Lever Act* and taken

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*Act of Congress approved August 10, 1917 (40 Stat. at L. 276).

"Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies; Provided, That nothing in this section that follows, shall be construed to require any natural person to furnish to the government any necessaries held by him and reasonably required for consumption or

prior to ascertainment and payment of compensation. Section 177 of the Judicial Code forbade the allowance of interest on claims against the United States. This Court, speaking by Mr. Justice Butler, held that "just compensation is provided by the Constitution and the right to it cannot be taken away by statute."

Reason supports the conclusion that the method by which appellant's ships were taken amounted in law to formal eminent domain procedure, the Proclamation of the President serving the purpose of effecting a transfer of title and affording record evidence of the transfer, just as does the report of commissioners, filed in a public office, in the more familiar modes of practice obtaining under state laws. And on the authority of the two cases last discussed, it is submitted that the right to compensation to which this taking, thus formally accomplished and evidenced, gave rise, is founded on the Constitution. The failure of the Joint Resolution of May 12, 1917, to expressly promise payment, no more impairs the constitutional right to be paid than did the silence of the Lever Act as regards the payment of interest defeat the claim for interest in the *Seaboard Air Line Company* case; nor the express exclusion of the franchise in the *Monongahela Nav. Co.* case defeat a recovery for its value.

The question presented is quite otherwise than it would have been if, the owner of these ships being an

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use by himself and dependents, nor shall any person, firm, corporation or association be required to furnish to the government any seed necessary for the seeding of land owned, leased or cultivated by them."

alien enemy, Congress had said, "payment shall *not* be made." The question has relation only to the consequences arising from the omission of an explicit direction to pay, and it is submitted that in those circumstances the Constitution requires payment to be made and the claim may therefore be said to be founded upon the Constitution.

As to whether or not the claim is "founded upon a law of Congress" refinements of reasoning will not be attempted. The result will be the same whether its foundation be a statute or the Constitution or implied contract. Therefore, for the statutory foundation only this is claimed: That the Joint Resolution was on the statute books, and the Proclamations effecting the change of title were in terms based upon the Joint Resolution; whence it follows that the taking cannot be called a tort, nor can it be called a capture under the laws of war—either the general laws of war or any particular measure in force in the late war, except the Joint Resolution itself—and that was an enactment that had effect upon ships owned by citizens equally with those owned by enemies, and that required, as to enemy ships no less than others, an appraisal of value which should be "evidence in all proceedings on any claim for compensation."

The conclusion of the Court below that the action was not founded upon a law of Congress seems to have been based in part upon the view that statutes do not impose liability unless they "in terms" purport to do so. But when a statute, recognizing ownership to be in another, authorizes the United States to take property for public use, action under that statute imposes liability even though the statute "in terms"

denies that liability shall arise. *Monongahela Nav. Co. v. U. S.* (supra). And mere silence on the question never exonerates the Government from liability. *A. W. Duckett & Co., Inc. v. U. S.* (supra).

To further support its conclusion that this action is not founded upon a law of Congress, the Court of Claims said (Opinion, Case p. 13):

> "If this Resolution can be made the basis of the suits, they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant?"

This reasoning overlooks a rule relating to the civil rights of enemies which is stated by this Court (quoting from Chitty) in *Hanger v. Abbott* (1868), 73 U. S. 532, in the following words:

> "We preclude him (an enemy) during war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy."

A masterly exposition of this rule is found in *Robson v. Wall* (1820), 2 Nott & M. (S. C.) 498. The Court of Claims itself applied the rule in *Sierra v. U. S.*, 9 Ct. Cls. 224, quoting from *Hanger v. Abbott* as follows:

> "Total inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent exists during war, but the restoration of peace removes the disability and opens the doors of the courts."

And in the case cited the Court of Claims gave the plaintiff "the full benefit of this exposition of the law," although the petition showed him to have been an alien enemy during the Civil War.

As to Quasi-eminent Domain Proceedings.

When a taking is effected by proceedings "in the nature of" or "as in" eminent domain, it gives rise to a right to compensation based upon implied contract. *U. S. v. Great Falls Mfg. Co.* (1884), 112 U. S. 645; *U. S. v. Lynah* (1903), 188 U. S. 445; *U. S. v. Buffalo Pitts Co.* (1914), 234 U. S. 228; *U. S. v. North American Trans. & Trading Co.* (1920), 253 U. S. 330; *A. W. Duckett & Co., Inc. v. U. S.* (1924) 266 U. S. 149; *Campbell v. U. S.* (1924), 266 U. S. 368.

In *U. S. v. Great Falls Mfg. Co.* the plaintiff recovered judgment in the Court of Claims for the past and future use and occupation by the United States of certain lands owned by the plaintiff and taken possession of by the United States in the execution of a plan for supplying the city of Washington with water. The United States did not assert any title to the lands. The lands were occupied by a dam or its abutment, constructed pursuant to an act of Congress. The Government commenced, but later abandoned, proceedings to condemn the lands, and simply took and held possession without acquiring title. Mr. Justice Harlan, speaking for this Court in affirming the judgment in favor of plaintiff, says (foot of page 656 of 112 U. S.):

> "* * * we are of opinion that the United States, having by its agents, proceeding under

> the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States."

In *Lynah v. U. S.* the majority of this Court, speaking through Mr. Justice Brewer, said (at page 471 of 188 U. S.):

> "But if any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

And, earlier in the opinion, (page 465 of 188 U. S.) he said:

> "The Government may take real estate for a postoffice, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obli-

> gation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

(In the *Lynah* case, three Judges dissented, upon the ground that the property had not been "taken" in a legal sense, because, by means of embankments and pumps, the flowing of the lands, which the majority found amounted to a taking, could have been prevented. The dissenting Judges do not dispute the propriety of the rule under a state of facts that calls for its application.)

In the *Buffalo Pitts Co.* case (supra), Mr. Justice Day, speaking for this Court, quotes with approval from the majority opinion in the *Lynah* case, and also says (foot of p. 235 of 234 U. S.):

> "While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use, it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this Court, and arises because of the Constitutional obligation embodied in the Fifth Amendment to the Constitution of the United States guarantying the owner of property against its appropriation for a governmental use without compensation."

In the *North American Trans. & Trading Co.* case (supra), the Commanding General of the Army in Alaska took possession, as a site for an army post, of a tract of public land which included plaintiff's mining claim. No condemnation proceedings were instituted, but the Government kept possession continuously ever after the taking. Mr. Justice Brandeis, speaking for this Court, in affirming the judgment of the Court of Claims in favor of plaintiff, says, (p. 333 of 253 U. S.):

> "First. When the Government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor."

And further:

> "In order that the Government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

The conditions precedent to liability thus stated are present in the instant case. The physical possession of the ships was taken by the Shipping Board or by the Navy Department, pursuant to the express directions of the President, which he issued by virtue of the power given him by the Joint Resolution authorizing him to "take over to the United States the immediate possession and title" of the ships and "through the United States Shipping Board, or any Department or agency of the Government, to operate, lease, charter and equip" the ships.

In *A. W. Duckett & Co., Inc. v. U. S.* (supra), the plaintiff was the lessee of a pier which formed a part of the Bush Terminal for a term running through to September 30, 1919. Under the Act of August 29, 1916, 39 Stat. 619, 645 (printed infra p. 20), silent as to compensation, the President took possession, through the Secretary of War, of the Bush Terminal. The pertinent provisions of the general order of the Secretary of War announcing the taking read as follows:

> "To Whom It May Concern * * * Possession and control is hereby taken* * *of the following described parts of a system of transportation * * * that is to say, all those portions of the Bush Terminal, docks and warehouse property described.* * * Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises."

Notice of this order was served on the Bush Terminal Co. The Receiver of Duckett & Co. was notified that "the Bush Terminal has this day been requisitioned for the use of embarkation service of the U. S. Army, and possession thereof has passed to the United States," and he was directed to make arrangements for vacating the premises. As the result of conferences, the United States took possession of the pier at midnight, January 31, 1918.

Mr. Justice Holmes, speaking for this Court, describes the procedure by which the taking was effected as *"in rem* as in eminent domain." The opinion holds that an implied promise arose from the order proclaiming the taking, saying, "Whatever the effect of the taking, *there was a contract implied in fact by the President's order* * * *". The part of the or-

der from which a promise could be implied was this: "Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises." It is respectfully submitted that this language no more implies a promise than does Section 2 of the Joint Resolution of May 12, 1917, reading:

> "That the Secretary of the Navy be, and he is hereby authorized, and *directed to appoint, subject to the approval of the President, a board of survey whose duty it shall be to ascertain the actual value* of the vessel, its equipment, appurtenances, and all property contained therein, *at the time of its taking,* and to make a *written report* of their findings to the Secretary of the Navy, *who shall preserve such report* with the records of his department. *These findings shall be considered as competent evidence in all proceedings on any claim for compensation.*" (Italics counsel's.)

The *promise of the President that steps will be taken* to ascertain just compensation, is surely of no more weight than the *direction of Congress that steps shall be taken* to that end.

In *Campbell v. U. S.* (supra) in the words of the Court:

> "An officer of the Army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land * * *"

Of this taking this Court, speaking by Mr. Justice Butler, said:

> "The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands." (Citing 39 Stat. 215, 40 Stat. 241, as amended by 40 Stat. 518) "And from the *taking* there arose an implied promise by the United States to compensate plaintiff for his loss." (Italics counsel's.)

Thus the Court holds that a taking done pursuant to statutory authority, although not accompanied by any words adding strength to the action, raises an implied contract to pay.

The takings in the case now before the Court were, on the face of the Proclamations, done under authority of the Joint Resolution, and therefore, according to the doctrine of the *Campbell* case, raise an implied contract of payment.

The Joint Resolution gave to the President a discretionary authority, without any reservation concerning the legal consequences which should ensue upon its exercise. He exercised the authority, and the consequences ensued of themselves, every department of the Government except Congress being powerless to prevent this automatic result.

The contentions under this Point, summarized, are as follows: Because the taking was by eminent domain, the owners are entitled by law to compensation. This right is grounded in the Constitution, supported by the Joint Resolution, and also rests upon an implied promise arising out of the Constitution, plus the Resolution, plus the action taken pursuant to the Resolution.

III.

As the taking was by eminent domain, and entitled the former owner to compensation, there is jurisdiction in the Court of Claims under section 145 of the Judicial Code to entertain a suit to determine the proper amount of the compensation.

The pertinent provisions of Section 145 of the Judicial Code (36 Stats. 1136) read as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable; *provided, however,* that nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

The benefit of Sec. 145 is extended to aliens whose Government extends a like right to American citizens (as appellant's Government does—See Petition,

R. 1, pars. 1 and 2) by Sec. 155 of the Judicial Code (36 Stats. 1139) reading as follows:

> "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

In the point preceding this an effort has been made to show that appellant's claim is founded upon the Constitution, upon a law of Congress and upon an implied contract. If the Court finds that the claim is based on any one of these foundations, no argument is required to demonstrate that the Court of Claims has jurisdiction under Sec. 145. It would then be true, as was said in the *Duckett* case, that "there is no doubt concerning the jurisdiction of the Court of Claims."

The Court below said (Case, p. 13, last par. of Opinion):

> "The Act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in *Haycraft's* case, supra; 'It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided.'"

And previously (R. 12, folio 17), the Court had said:

> "It is significant when the policy of legislation during the war is considered that pro-

vision was made for action against the Government in all cases where it was intended to confer the right."

Regarding these observations, counsel submits (a) that it is of no moment that the Joint Resolution did not expressly confer jurisdiction; (b) that it is of no moment that in other legislation enacted during the war "provision was made for action;"—(the *Duckett* case establishes these two propositions)—(c) that to say that the Court's general jurisdiction does not extend to suits of this kind is only to beg the question. That dictum necessarily assumes the soundness of this theory: That an alien generally entitled to bring suits in the Court of Claims is disentitled to sue for the value of property taken from him under circumstances which would entitle a citizen to sue, ***merely by reason of the fact that at the time of the taking his government and ours were at war.*** But this is not to be assumed; it is to be reasoned about. It is the nub of the case.

In the next point an effort will be made to demonstrate that the theory thus assumed by the court below is unsound; and that the true rule of law is that such an alien may sue, after the restoration of peace, unless *Congress* has deprived him of the right; and that, in the present instance, Congress has not done so,—in other words, that the jurisdiction granted by Sec. 145 of the Judicial Code and the right to sue, granted aliens by Sec. 155, is not taken away by the mere fact—without more—that war has occurred. (Of course the right to sue is suspended so long as war lasts, but it revives when peace returns.)

IV.

The propositions put forth in the preceding points, undeniably sound as applied to the taking of property belonging to a citizen, are in this case no less sound by reason of the fact that appellant was an alien enemy.

As just stated, underlying the decision of the Court below is the assumption that because appellant was an alien enemy it was ipso facto deprived of the benefit of the Constitutional provision (Amendment V) guaranteeing due process of law and protecting private property against takings for public use without compensation.

Counsel believes this theory to be wrong. All that this Court has ever asserted regarding this question is that, *if Congress so enacts,* the private property of enemy subjects *may* be confiscated. This assertion has never been made with respect to property protected by such treaty provisions as applied to appellant's ships; nor has it been made since the principles embodied in Articles 1 and 2 of Convention VI of the Second Hague Conference had attained a fixed place in international law; nor since official spokesmen for the United States had asserted that our country claimed (and by long practice had exemplified) rights of protection and immunity for enemy merchant ships still greater than those afforded by Convention VI.

Without attempting to detract from the opinions in which this Court has given utterance to the doctrine that Congress may, in general, authorize the confiscation of the private property of alien enemies, doubt may be expressed whether those decisions

would support a holding that the Constitution permits Congress to authorize the confiscation of the ships of this appellant. The Prussian Treaties (supra p. 40) and the decision in *Society, etc. v. New Haven,* 8 Wheat 464, read together, seem to deny the power. *McVeigh v. U. S.* (1871) 11 Wall. 259, and *U. S. v. G. W. P. C. Lee* (1882) 106 U. S. 196 at least bring the power into question, for they hold an alien enemy entitled to *some* of the safeguards of the Fifth Amendment—and if to some, why not to all?

In *U. S. v. New River Collieries Co.* (1923), 262 U. S. 341, this Court, speaking by Mr. Justice Butler, remarked that the war did not suspend or affect the provisions of the Fifth Amendment; and in *ex parte Milligan,* 4 Wall. 2 (at p. 120-121), it declared this principle in terms which (especially when the later *McVeigh* case is remembered) seem broad enough to embrace even alien enemies, and seem peculiarly applicable to a case wherein a standing in court—otherwise not to be doubted—is denied merely because the plaintiff's government and ours came to be at war. This Court, through Mr. Justice Davis, in the *Milligan* case, said:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, *and covers with the shield of its protection all classes of men, at all times, and under all circumstances.* No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that *any of its provisions* can be suspended during *any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based

> is false, for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proven by the result of the great effort to throw off its just authority." (Italics counsel's).

This Court said "these provisions *cannot be suspended,*" i. e., not even by an Act of Congress. But in the instant case the Court below held, in effect, that they *were* not only suspended, but swept away, without one word from Congress, by the mere fact that war occurred between our country and that of the appellant.

Moreover, the claim of a power to confiscate would do violence to Convention VI of the Second Hague Conference, and greater violence still to what our delegates to that Conference described as a principle and practice of the United States (and indeed of all civilized countries) so long held and so uniformly followed as to "place it in the category of obligations." (Foreign Relations, 1907, Part 2, p. 1158).

For the reasons suggested, the power of Congress will not be conceded; but to abbreviate the argument all that will be urged is that, *if the power exists, Congress has not exercised it.*

In *Brown v. U. S.* (supra) this Court held as follows:

1. That a belligerent government has power to confiscate the private property of enemy subjects found within its borders (8 Cranch, foot of p. 122).

2. That, in this country, this power may be exercised only by Congress. "It is proper for the con-

sideration of the legislature, not of the executive or judiciary." (Ibid, p. 129.) "But until that will (of the "sovereign authority," i. e., of Congress) shall be expressed, no power of condemnation can exist in the court." (Ibid, top p. 123).

3. That "a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent" (Ibid, p. 127).

4. That the executive may not seize, nor the courts condemn, property which is subject to confiscation, unless Congress authorizes confiscation. (Ibid, p. 128).

5. That the declaration of war against Great Britain in 1812 did not authorize confiscation, because it did not contain any expression indicating an intention to confiscate. (Ibid, p. 127). (To show that, judged by the same reasoning, the Declaration of War against Germany did not authorize confiscation, the two Declarations are printed in the margin.*)

***Declaration of War against Great Britain**
1812

(2 Stat. at L. p. 755)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and

Declaration of War against Germany
1917

(40 Stat. at L. Part 1, p. 1)

"Whereas the Imperial German Government has committed repeated acts of war against the government and the people of the United States of America: Therefore be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That

their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof. Approved, June 18, 1812."

the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.
Approved, April 6, 1917."

[It must be admitted that in *Brown v. U. S.* the Court stated the question before it as one relating to "British property found on land at the commencement of hostilities." It is submitted, however, that, in reason, appellant's ships, idle and tied up to docks in American waters for almost three years, fall within this category rather than any other; or at least that the rule applying to them should be the same. Chief Justice Marshall suggests that, in international law prior to the decision in *Brown v. U. S.*, "in practice vessels with their cargoes, found in port at the declaration of war, may have been seized." But such a practice, if authorized at that time, has been universally abandoned, at least since the Crimean War; and, as denying its present existence, Mr. John Bassett Moore (Digest of Interna-

tional Law, Vol. 7, p. 308), quoting from Hall says:

> "*Property* belonging to an enemy which is found by a belligerent within his own jurisdiction, *except property entering territorial waters after the commencement of war,* may be said to enjoy a practical immunity from confiscation." (Italics counsel's.)]

The Court below referred to *Brown v. U. S.* to support its observation that "the Joint Resolution was an exercise of the war power of Congress" and that it "finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water." (Opinion, R. 9, 3d par.)

The *Brown* case, however, indicates that an intention to exercise war power against enemy private property *will not be presumed from the mere fact that war exists,* but must be fairly apparent on the face of the statute; and counsel submits that Marshall's opinion affords no ground to suppose that he would have ascribed to the war power, as a measure of confiscation, an Act of Congress that applied to a class of property, some of which had come into the ownership of citizens, allies or neutrals, and all of which, if taken, was required to be appraised,—the report of the appraisers to be "Competent evidence in all proceedings on any claim for compensation."

It is submitted that the true doctrine of the *Brown* case as applied to the circumstances of the instant one, is that, inasmuch as Congress has not in any manner shown an intention to confiscate appellant's ships or to deprive appellant of any property rights, appellant stands, both in respect of its right to be compensated and its right to sue in the Court of Claims,

in exactly the same situation as that of a citizen owning ships taken under the Joint Resolution.

The unsoundness of the view held by the Court below is demonstrated by the fact that, as applied in Case No. 111, (*Atlas Line SS. Co. v. U. S.*) it resulted in a finding that a domestic corporation owning barges that had been under American enrollment since 1913 and that were taken under the Joint Resolution, was without right or remedy, presumably by reason of the fact that the stock of the owning corporation was held by Germans.

To further support its conclusion that the Joint Resolution was an exercise of the war power and rested upon the Constitutional provision empowering Congress to declare war and make rules concerning captures on land and water, the Court of Claims invoked cases that may be classified as follows:

(a) *Cases arising under the Trading with the Enemy Act of October* 6, 1917 (40 Stats. 411).

Stoehr v. Wallace, 255 U. S. 239

Commercial Trust Co. v. Miller, 262 U. S. 51.

Fischer v. Palmer, 259 Fed. 355

Salamandra Ins. Co. v. N. Y. Life Ins. Co. 254 Fed. 852.

(b) *Cases arising under the Civil War Confiscation Acts of Aug.* 6, 1861 (12 Stats. 319) *and July* 17, 1862 (12 Stats. 589).

Miller v. U. S., 11 Wall. 268

(c) *Cases arising under the Civil War "Abandoned and Captured Property Act" of March* 12, 1863 (12 Stats. 820)

Green's Case, 10 C. Cls. 466
Klein's Case, 13 Wall. 128
U. S. v. Anderson, 9 Wall. 56
Lamar v. Browne, 92 U. S. 187
Young v. U. S., 97 U. S. 39
Moore's Case, 10 C. Cls. 375
Haycraft v. U. S., 22 Wall. 81

(d) *Cases arising out of Naval and Military Captures during the Spanish War, made without any statutory authority:*
Herrera Nephews v. U. S., 43 C. Cls. 430; 222 U. S. 558
Ribas y Hijo v. U. S., 194 U. S. 315

It is thought that none of these cases support the view expressed by the Court of Claims.

As to the cases in Class (a), the lack of analogy between the Trading with the Enemy Act and the Joint Resolution of May 12, 1917 already has been shown (supra, p. 22).

As to the cases in Class (b), these decisions were evoked by statutes which contained the following provisions:

The Act of August 6, 1861 (12 Stats. 319) was entitled "an Act to Confiscate Property used for Insurrectionary Purposes" and provided that property of any kind, used or employed, or bought or sold with the intention to use or employ, in aiding the Confederacy, should be "lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, *confiscated* and condemned." Judicial machinery and procedure to effect this result were provided. Mr. Justice Strong, speaking for this Court in *Miller v. U. S.,* at p. 308 of 11 Wall., characterized the Act in the following words:

"It defined no crime. It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet or promote the Rebellion, then a war, or to maintain the war against the Government."

The Act of July 17, 1862 (12 Stats. 589) was entitled *"An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."* Its first four sections prescribed penalties for the crimes of treason and insurrection. It then provided as follows:

"Sec 5. *And be it further enacted, That to insure the speedy termination of the present rebellion,* it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States, that is to say:

"First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the United States.

"Secondly. Of any person hereafter acting as President, Vice-President, member of Congress, judge of any court, cabinet officer, foreign minister, commissioner or consul of the so-called confederate states of America.

"Thirdly. Of any person acting as governor of a state, member of a convention or legislature, or judge of any court of any of the so-called confederate states of America.

"Fourthly. Of any person who, having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called confederate states of America.

"Fifthly. Of any person hereafter holding any office or agency under the government of the so-called confederate states of America, or under any of the several states of the said confederacy, or the laws thereof, whether such office or agency be national, state, or municipal in its name or character: *Provided,* That the persons, thirdly, fourthly, and fifthly above described shall have accepted their appointment or election since the date of the pretended ordinance of secession of the state, or shall have taken an oath of allegiance to, or to support the constitution of the so-called confederate states.

"Sixthly. Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

"Sec. 6. *And be it further enacted,* That if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the

United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance, to the United States, all the estate and property, moneys, stocks and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid or the proceeds thereof. And all sales, transfers, or conveyances, of any such property after the expiration of the said sixty days from the date of such warning and proclamation shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Sec. 7 provided for proceedings *in rem* to effect confiscations required by the preceding sections.

A Joint Resolution was enacted July 17, 1862 (12 Stats. 627) explaining and qualifying the foregoing statute, exempting certain acts and certain classes of persons from its operation, and providing that "nor shall any punishment or proceedings under said Act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

In *Miller v. U. S.* (supra), a majority of this Court held that these two statutes were enacted in the exercise of the *war power* (78 U. S. 305-314). Mr. Justice Field, in a dissenting opinion, concurred in by Mr. Justice Clifford, reasoned that the Act of 1862 was *"not passed in the exercise of the war powers of the Government, but in the exercise of the municipal power of the Government to legislate for the punishment of offenses against the United States."* (78 U. S., last par. of p. 319). This seems to have been the tacitly admitted view of the whole Court

a year earlier, for in *U. S. v. Anderson* (1870) 9 Wall. 56, (at top of p. 67) it is said unanimously of the act of July 17, 1862 that "The confiscation law concerns rebels and their property; was intended as a measure to cripple their resources; and, insofar as it claims the right to seize and condemn their property, *as a punishment for their crimes,* recognizes that certain legal proceedings are necessary to do so." (Italics counsel's). Whatever be the foundation of these statutes, it is submitted that their content, and their purposes as expressed in their titles, are not such as to lead a reasoning mind to accept a judicial decision, based upon them, as precedent for the proposition that the Joint Resolution of May 12, 1917 is an exercise of the war power, and has the practical effect of confiscation by closing the doors of a court which otherwise would be open to appellant. The test of the applicability of the Civil War confiscation Acts was this: Was the property in question intended to be used to aid the rebellion; or was its owner giving aid to the rebellion? If the answer were yes, the statutes expressly commanded confiscation. The test of the applicability of the Joint Resolution of 1917 was this: Was the ship German owned, in whole or in part, or under German registry or flag when she came into our waters? If the answer were yes, the Resolution permitted her to be "taken over" to the United States in possession and title, and, if she were taken over, required that she be appraised and that the appraisal should be "evidence in all proceedings on any claim for compensation."

The Abandoned and Captured Property Act of March 12, 1863 (12 Stats. 820) was entitled "An

Act to provide for the Collection of abandoned Property and for the Prevention of Frauds in insurrectionary Districts within the United States."

So far as pertinent to this discussion, its provisions were as follows:

Section 1 authorized the Secretary of the Treasury to appoint special agents "to receive and collect all abandoned or captured property" in insurrectionary territory; excepting property used or intended to be used in waging war against the United States.

Section 2 authorized the appropriation of such property "to public use on due appraisement and certificate thereof," or the sale thereof in loyal territory, at auction to the highest bidder, the proceeds to be paid into the U. S. Treasury.

Section 3 required that the agents should give bond and that accounts should be kept, and provided that "any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said Court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds,"—after deduction of expenses, etc.

Section 4 provided that there "shall be confiscated to the use of the Government of the United States" property coming into loyal territory from insurrectionary territory otherwise than through the Treasury agents; and, by reference incorporating other statutes, afforded procedure to effect the condem-

nation and sale of confiscated property, and punishments for unauthorized persons bringing such property into loyal territory.

Section 5 referred to the payment of certain agents.

Section 6 required persons in the military service to turn over to the Treasury Agents property affected by the Act, and provided penalties for failure to do so.

Section 7 exempted from the operation of the Act lawful maritime prizes by the naval forces of the United States.

The nature and effect of the Act were described by this Court in *Klein's Case,* 80 U. S. 138, in the following words:

> "That it was not the intention of Congress that the title to these proceeds should be devested absolutely out of the original owners of the property, seems clear upon a comparison of different parts of the act.
>
> * * *
>
> "* * *The government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property, and for those whom it should thereafter recognize as entitled. By the act itself it was provided that any person claiming to have been the owner of such property might prefer his claim to the proceeds thereof, and, on proof that he had never given aid or comfort to the Rebellion, receive the amount after deducting expenses.
>
> "* * *There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the government, and restoration of the pro-

> perty is pledged to none except to those who have continually adhered to the government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy subsequently to be developed."

The several cases arising under this Act, cited in the opinion of the Court below, will now be analyzed.

Green's case, 10 C. C. 466, held that:

> "All persons on this (northern) side of the military lines, from the legal point of view, were the enemies of all persons on the other,"

and that hence there was no liability of the Government

> "for the acts of its officers, done under cover of its authority, within the insurrectionary district, where the party injured was loyal, and the circumstances were such as would give to a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property shall not be taken for public use without just compensation."

The Court said that the only exception was the right given by the Act under discussion. It denied relief to Green under that Act because the suit was not commenced until after the statutory period of limitation had run. It summed up its denial of his right to maintain the suit on grounds outside that Act by saying:

> "Our conclusion is that the Government is not liable upon implied contract to any person, loyal or disloyal, for property taken by its agents, civil or military, during rebellion, *within the insurrectionary district."*

It is a necessary corollary of the reasoning of this case that property found *in our territory,* outside the field of hostilities, although owned by a subject of the enemy, is not to be regarded as subject to confiscation, in the absence of an authorizing statute. So this Court held in *Brown v. U. S.,* 8 Cranch 110.

Miss Moore's case, 10 C. C. 375, so far as pertinent, is also easily to be distinguished. For certain property she was allowed to recover under the Abandoned and Captured Property Act. The property for which a recovery was denied was captured by combined military and naval forces in March, 1862, in the progress of hostile operations against the town of New Berne, in insurrectionary territory, and prior to the passage of any statute authorizing loyal owners to recover the proceeds of property captured in insurrectionary districts. The seizure was justified under the laws of war as a capture by military forces, in hostile territory. If not so justified, it was a tort.

Klein's case, 13 Wall. 128, is referred to above and needs no further mention. (The principal point involved related to the effect on the claimant's rights of a pardon.) It may be remarked in passing that the Court says—p. 144 of 13 Wall—that "it was urged in argument that the right to sue the Government in the Court of Claims is a matter of favor; but this seems not entirely accurate. *It is as much the duty of the Government as of individuals to fulfill its obligations.*" (Italics counsel's.)

Most of the questions involved in *U. S. v. Anderson,* 9 Wall. 56, are wholly foreign to the point at issue here. They related to limitations under the Abandoned and Captured Property Act; the validity

of titles acquired by purchase from insurrectionaries; the competency of witnesses; and the right of the Court of Claims to render a judgment for a specific sum.

As pertinent to the present discussion, and showing the futility of the claim that the *Anderson* case supports the proposition that the Joint Resolution of May 12, 1917 is an exercise of the war power, it may be remarked that the Court said (p. 65 of 9 Wall.):

> "During the progress of the war it was expected that *our forces in the field would capture property*, and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of."

And further (Ibid p. 67)

> "But by the Act in question the Government yielded its right to seize and condemn the property which it *took in the enemy's country*, if it belonged to a faithful citizen * * *" (Italics counsel's).

These remarks seem to indicate that in the view of this Court the right of the United States to take the property that was involved in the cases arising under the Act in question, was the right possessed by a beligerent *operating in the territory of his enemy*—a situation wholly dissimilar to that presented by the seizure of appellant's ships under the Joint Resolution of May 12, 1917.

Lamar v. Browne, 92 U. S. 187, was a suit by the former owner of cotton taken under the Abandoned and Captured Property Act against the Treasury agents who had received it from the military com-

mander and dealt with it as provided in the Act. Judgment went for the defendants upon the following theory: (a) that the Treasury agents "occupied the same position as to the plaintiff that the military authortiies did" (92 U. S. 200); and (b) that the "military forces, therefore, in taking possession of the cotton in controversy, were clearly acting within the general scope of their powers as an army still in possession of enemy territory under orders from their superiors." (Ibid, 197). The capture of the cotton, no matter what the citizenship or allegiance of its owner, was held legal because it "was seized by the military forces of the United States in obedience to the orders of a commanding general" (Ibid, 193),—while "still, in fact, a state of war existed," and the place where the seizure occurred was actually governed by means of military occupation (Ibid, p. 193). The decision rests squarely upon the ground that the taking of the cotton was a military capture by an army operating in the enemy's country—a fact impossible to assume in regard to the taking of appellant's ships.

Young v. U. S., 97 U. S. 39, was a suit by the trustee in bankruptcy of a blockade runner who, during the war, was a subject of and domiciled in Great Britain, and from thence had actively aided the Confederacy, to recover for cotton belonging to him, in storage at Savannah, and seized there by our military forces upon the capture of that city, and sold by Treasury agents in New York pursuant to the Act. This Court, speaking by Mr. Chief Justice Waite, said:

> "It is beyond doubt that, during the war, cotton found within the Confederate territory,

> though the private property of non-combatants, was a legitimate subject of capture by the national forces" (citing cases) and "The authority for the capture was not derived from any particular act of Congress, but from the character of the property, * * *"

the importance of cotton in enabling the Confederacy to maintain itself and carry on the war being stated at length.

The Court also said (97 U. S. 60) "all property within enemy territory is in law enemy property just as all persons in the same territory are enemies;" and it held that the location of the property authorized its seizure by an army operating in enemy's country.

Haycraft v. U. S., 89 U. S. 738, was a suit by one who admitted that he had given aid and comfort to the Rebellion, had refused to take the oath of allegiance, and whose disabilities were not removed until the general Proclamation of December 25, 1868, after the expiration of the time for bringing suits fixed by the Abandoned and Captured Property Act, and who therefore was precluded from the benefit of the Act. He asserted that as he had been pardoned after the expiration of the period of limitations contained in the statute he was entitled to recover for his cotton as upon implied contract. The petition (taken to be true, as the case was disposed of on demurrer) alleged that the seizure occurred within the Federal lines and was not a valid capture in war. Perhaps in view of this allegation, this Court said that the taking was "under the authority of an Act of Congress" and that "we must look to the Act to see if this promise has been made." (89 U. S. 92). Looking to the Act the Court said:

> "There was no promise * * * except to such as should commence the suit in time, and

> upon the trial be in a condition to bring themselves within the requirements of the Act. The promise, such as it is, was express. There is no room left for implication. Pardon and amnesty have no effect, except as to such as sue in time." (Ibid p. 96)

And, further (p. 98):

> "There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemy's property on land. But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. The demandant in this case neglected to avail himself of the remedy provided and, consequently he is now without any. That remedy was the only one of which the Court of Claims or any other court has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

Thus this Court held that the requirement of bringing suit within two years was an incident to the jurisdiction of the Court of Claims, rather than a statute of limitations—that the sovereign had consented to be sued only in case he were sued within two years. The Court also said that there was no question of confiscation, but that the statute giving the right required the remedy to be exercised within

two years or not at all, and had given the Court jurisdiction only of cases commenced within the two-year period. Nothing was decided that has any application in the instant case.

The cases just discussed arose under a statute that authorized the sale of property captured or abandoned in insurrectionary territory, treating it as enemy property because of its location in the enemy country, and that permitted the Court of Claims to give judgment for the amount of the proceeds, lodged in the Treasury, in favor of such loyal owners (and, later, disloyal owners also if they had been pardoned) as brought their suits within two years after the close of the war. The statute was an act of grace. Without it there could have been no recoveries, for all the takings were either captures lawful by the rules of war, without legislative authority, because made in the course of hostile operations in the enemy's country; or they were torts. These decisions therefore have no bearing on the case now before the Court, and no language contained in them is of binding force in the determination of rights arising under a statute by means of which the United States, by permissive authority, acquired absolute title to property located outside the field of military operations, subject to a mandate that the property acquired must be officially appraised and that the appraisal should be "evidence in all proceedings on any claim for compensation."

The Spanish War cases, listed in Class (d), are true examples of war-power takings giving rise to no cause of action.

In *Ribas y Hijo v. U. S.*, 194 U. S. 315, and in *Herrera Nephews v. U. S.*, 222 U. S. 558, recovery

was sought for the value of the use of Spanish vessels, having Spanish masters and crews, captured by our naval forces in Spanish territorial waters in the course of hostile operations and thereafter employed by our army for war purposes. There was no statute authorizing the seizures, and this Court described their character as follows:

(*Ribas* at p. 323 of 194 U. S.)

"The seizure, which occurred while the war was flagrant, was an act of war, occurring within the limits of military operations * * *"

And, (*Herrera,* at p. 569 of 222 U. S.)

"Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemies' property, and subject to seizure, confiscation and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war."

It was also said in this case (Ibid, p. 573) that if the seizure was not justified as a military act it was a tort.

Of course this cannot be said of the seizure of appellant's vessels, done as it was under the order of the head of the Government and by express authority of an Act of Congress.

In *Juragua Iron Co. v. U. S.* (1909) 212 U. S. 297, buildings in Cuba, belonging to an American corporation doing business there, were burned by order of the commanding general of our army on ad-

vice of his medical corps, for protection of the health of the troops, the buildings being supposed to contain yellow fever germs. The Supreme Court held that the destruction did not expose the United States to liability of suit, on the ground that the property *because of its being located in the enemy country and in the theater of war,* was to be deemed enemy property, despite its American ownership; and said (212 U. S. at p. 306), it was "indeed, subject, under the laws of war, to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy." And to the contention that the destruction was not justified by the laws of war, the Court said:

> "Again, if, as contended—without, however, any basis for the contention—the acts of that officer were not justified by the laws of war, then the utmost that could be said would be that what was done pursuant to his order amounted to a tort, and a claim against the government for compensation on account thereof would make a case 'sounding in tort,' but of such a case the court would, of course, have no jurisdiction under the act of Congress."

The right to destroy the property under the laws of war was said to exist because "the plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country."

As applied to the case now before the Court, this

reasoning leads logically to the conclusion that the appellant, as a German corporation doing business in the United States, was to be regarded, with respect of its property in this country, as *not* being an enemy. The same result flows from the reasoning employed in the other Spanish War cases that have been discussed, and it accords with the reasoning of Marshall in *Brown v. U. S.,* (supra) that express interposition by Congress is necessary to deprive enemy property, *found here at the commencement of hostilities,* of the rights that our law accords to property in general.

The Civil and Spanish War cases cited by the Court below have been analyzed and discussed for the purpose of showing that they all so differ from the instant case, either in respect of facts, or in respect of the statutory basis of decision, as to clearly distinguish them from the case at bar. The instant case can be decided in favor of appellant without doing violence to any preceding decision. It cannot be decided against appellant without impairing the doctrine of *Brown v. U. S.* That case remains the landmark, guiding the mind to a correct determination here. It repels the conclusion that appellant's ships were confiscated. It leads to the conclusion that the takings created a right in favor of appellant. *Hanger v. Abbott,* 73 U. S. 532, establishes that, with the return of peace, Sections 145 and 155 of the Judicial Code once more afforded appellant a means and forum for enforcing this right, and unless these cases are to be overruled it is a necessary conclusion that the Court below erred in pronouncing a decision that effected a practical confiscation of appellant's property by denying access to the only competent tribunal.

V.

The Peace Resolution of July 2, 1921, and the Treaties of Berlin and Versailles do not destroy appellant's right nor bar its remedy.

The Government's brief in the Court of Claims set up the following contention:

> "Regardless of whether this taking of ships by the United States was a seizure of enemy property in time of war or whether it was a tort, and even assuming, but not conceding, that there is some expressed or implied contract or agreement to compensate for the same, or some Act of Congress that authorized compensation therefor, yet the provisions of the Treaty of Berlin, together with the provisions of the Treaty of Versailles, which by virtue of the Treaty of Berlin, as well as the Joint Resolution of Congress of July 2, 1921, are carried into the substantive laws of the United States, confirm and ratify the taking of these ships by the United States and prohibit the claim here made by this claimant and prevent its allowance or adjudication by this court."

In elaborating this contention the Government invoked the following:

> Sections 2 and 5 of the Peace Resolution of July 2, 1921 (42 Stat. Part I, 105), incorporated also in the Treaty of Berlin (42 Stats. Part II, 1939).
>
> Article I of the Treaty of Berlin and a part of Article II.
>
> Certain portions of Article 297 and the Annex thereto of the Treaty of Versailles.

It is not believed that this material, properly understood, has the effect which the Goverment as-

cribed to it in the Court below, and, presumably, will ascribe to it here.

As to the Peace Resolution and Berlin Treaty proper:

Section 2 of the Peace Resolution (incorporated also in the Treaty of Berlin) reads as follows:

> "That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."

Section 5, so far as pertinent and excluding irrelevant matter, reads as follows:

> "All property * * * of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents or employees, from any source or by any agency whatsoever * * * shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specific-

ally hereafter shall be provided by law until * * *" the German Government shall have performed certain conditions.

Now one of the *rights* acquired by the United States by *virtue of an Act of Congress,* and which is expressly reserved to the United States by Section 2, is its right in, (title to and possession of) the ships acquired pursuant to the Joint Resolution of May 12, 1917. It seems to be clear that the right to the ships is derived solely from the Act (Joint Resolution) of Congress. The ships were never put through a prize court, and the only title or evidence of title the United States possesses results from the Joint Resolution and a Proclamation of the President. The important result is that the ships are not a part of the property of *German nationals* directed by Section 5 of the Peace Resolution to be "retained and no disposition thereof made, * * *" The ships were the property of the United States when the Peace Resolution was adopted, and it operated upon them only by way of reserving (confirming) the title the Government had previously acquired. That the Government itself has taken this position ever since the passage of the Peace Resolution and the adoption of the Berlin Treaty (August 25, 1921) is a matter of public record. Since that time the United States has sold many of the ships taken under the Joint Resolution of May 12, 1917. The records of the Shipping Board, of the Bureau of Navigation and of the custom houses where the ships were registered, disclose this fact. To cite one instance, the United States sold, in August, 1922, to the present appellant, the steamer then named the "Pocahontas," now named the "Bremen," and originally named the

"Princess Irene," under which name she was taken over by the United States from the North German Lloyd by virtue of the Proclamation of June 30, 1917, printed supra, p. 6.

This fact is of importance. Appellant asserts that by correct principles of statutory construction this ship property is outside Section 5 of the Peace Resolution. The United States supports this assertion by its act in selling, as its property, the former German ships.

By another fact, the exclusion of the ships from the retention provision of Section 5 is established. That is, that the property to be retained is the property of *Germans,* which was on April 6, 1917, or since has come "into the *possession* or under *control* of, or has been the subject of a *demand* by" the United States, etc. Considering the care with which words are employed in framing Treaties, it is a justified conclusion that this phraseology was advisedly framed to exclude property formerly German owned, but the actual title to which, as distinguished from mere possession, mere control or mere demand without either possession or control, had passed to the United States. The lesser cannot contain or comprehend the greater.

The proper conclusion seems to be that the words relate only to property taken under the Trading with the Enemy Act, a provision of which, previously quoted, reserves to Congress the right of disposing of property taken under that Act, in such manner as it might see fit, after the close of the war; and that property (such as the ships) to which the United States took actual title, under other acts of Congress, is intentionally excluded. Any other construction

would cast doubt upon the character of the title acquired by the United States, and upon its right to sell any of these ships in the absence of authority "specifically provided" by Congress subsequent to July 2, 1921. (The authority under which sales have been and are made is "Merchant Marine Act 1920," Act of June 5, 1920, 41 Stats. 988, Secs. 4, 5 and 6).

Section 5 of the Peace Resolution is also inapplicable because this suit does not seek the recovery of the ships themselves, nor of any fund created by the Government to represent the ships (there being no such fund).

As to the effect of the Versailles Treaty:

Articles I and II of the Treaty of Berlin secured to the United States the option of taking advantage of certain provisions of the Treaty of Versailles, if it should see fit to do so, by providing:

> "*Article I*—Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles, which the United States shall fully enjoy, notwithstanding the fact that such Treaty has not been ratified by the United States."
>
> "*Article II*—With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is un-

derstood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

"The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions."

In the Court below, the Government, assuming that the language just quoted had the effect of rendering the mentioned Parts of the Treaty of Versailles actually operative as a part of the public law of the United States, invoked the following provisions of Article 297 (contained in Part X), treating them as though they could be separated from their context, and, standing alone, given literal effect:

Par. (*d*)—"As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty."

A part of Par. (*h*) (2) *as follows*:—* * *
"The proceeds of the property, rights, and interests, and the cash assets of German nationals received by an Allied or Associated Power shall be subject to disposal by such

Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto." (The Government omitted to quote the remainder of this paragraph, reading: "Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.")

Par. (*i*)—"Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States."

Par. 2 of the Annex to Article 297—"No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights, or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power."

Standing alone, these provisions might seem to bar appellant's claim. Read in connection with their context and understood as applied in those countries wherein the Treaty of Versailles is operative, they have no such effect.

Perhaps it should suffice to say that the Treaty of

Versailles was not ratified and is not in effect in this country and forms no part of our law. It is considered better, however, to undertake a detailed study of the matter, in case the Court shall find itself compelled seriously to consider this phase of the case. The results sought to be demonstrated are:

1. Article 297 of the Treaty of Versailles, if operative in the United States, is not applicable to the case now before the Court.

2. Article 297 is not operative in the United States.

3. Article 297, if applicable and operative, has not the meaning or effect claimed for it by the Government.

Extracts from the Treaty of Versailles, necessary to be referred to in the argument supporting these propositions, are printed as Appendix B to this brief.

Article 297 is not applicable:

The plan of construction of the Versailles Treaty is this: There are 15 main divisions called "Parts." These are subdivided into "Sections," the Sections into "Chapters" and the Chapters into "Articles." Interspersed between Articles are numerous "Annexes."

Article 297 is found in Part X, the heading of which is "Economic Clauses," and is placed under Section IV, the subhead of which is "Property, Rights and Interests." Other Sections of this Part bear sub-heads as follows: I, "Commercial Relations;" II,"Treaties" (This details various old treaties of a commercial, economic or technical, rather than a political character, which are to be brought

again into effect with the restoration of peace;) III, "Debts;" V, "Contracts, Prescriptions, Judgments;" VI, "Mixed Arbitral Tribunal" (for decision and settlement of various commercial and property questions); VII, "Industrial Property;" VIII, "Social and State Insurance in Ceded Territory." Ships are not mentioned anywhere in this Part.

On the other hand, merchant shipping is dealt with specifically in Part VIII, headed "Reparation." Article 236 and Annex III in this Part set forth in detail the Treaty provisions relating to merchant ships. It would seem that if the Government relies upon the Treaty of Versailles it should cite those portions of the Treaty that relate to ships. Article 297 seems to be foreign to this subject, and hence the statement that, even if operative here, it is not applicable to the case before the Court.

It may be that the Government, in the Court below, refrained from invoking the provisions relating to shipping for the reason that, obviously, those provisions do not aid it in this case. By reference to them (see Part VIII, Annex III, Pars. 1 and 3) it appears that the merchant ships ceded by Germany to the Allied and Associated Powers included (and of course, could include) only such as were German owned at the effective date of the Treaty (at earliest for any Power, 1919); at which time the ships formerly owned by appellant had been for more than 2 years owned by the United States. Moreover, (See Part VIII, Annex III, Par. 8), the waiver by Germany of claims relating to shipping is only *"in respect of the detention, employment, loss or damage of any German ships,"*—words that do not comprehend and hence do not waive or bar a claim arising in favor of

a private German ship owner in consequence of a foreign Government taking title to his ships under such a law and in such a manner as to entitle him to compensation.

Furthermore (See Part VIII, Art. 236), if these provisions concerning merchant shipping were effective in respect of appellant's ships, or of its claim against the United States, the United States would be bound to credit Germany, on reparation account, with the value of the ships or the claim; and this the United States has not done.

Article 297 is not operative in the United States:

To show the truth of this statement requires reference to a number of the provisions of the Treaty with which Art. 297 is tied up, and the demonstration can proceed only slowly, and step by step.

The only provisions of the Versailles Treaty which ever could have become applicable to the United States are Section 1, of Part IV and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV (See Treaty of Berlin, Art. II). *And concerning these provisions the following points must be kept in mind.*

1. The United States was to have and enjoy the benefits of the mentioned provisions of the Versailles Treaty only in case it desired to. The United States was given an option to enjoy them; it did not obligate itself to accept them (Berlin Treaty, Art. I and first 2 paragraphs of Art II).

2. *If, however, the United States did accept the benefits of the mentioned provisions of the Versailles Treaty, it had to accept a corresponding burden by recognizing the correlative rights which these provisions accord to Germany.* In the words of the Berlin Treaty, "The United States in availing itself

of the rights and advantages stipulated in the provisions of that Treaty (*i. e.,* Versailles) mentioned in this paragraph, will do so in a manner consistent with the *rights* accorded to Germany under such provisions."

In the two preceding paragraphs the past tense has been used advisedly, because it is proposed to show *that the United States has definitely rejected Article 297 of the Treaty of Versailles* and has entered upon a course of action quite contrary to it, as a substitute more advantageous to the United States.

The scheme of Art. 297 is repugnant to the policy and to the law of the United States as already established by the measures taken by our Government in the execution of the Treaty of Berlin. *To seek to profit by Art. 297 in this case is to invoke a scheme which the Government has already definitely rejected, and to invoke as a rule of decision a foreign law (treaty) which is not law in this country.*

Art. 297 contains ten subdivisions, identified by letters running from (a) to (j). Some of these are in turn subdivided into as many as four paragraphs. Also this Article incorporates, by reference in its opening paragraph, an annex, which itself contains fifteen numbered sub-heads, a number of which contain several paragraphs each. Out of all this mass the Government selected the four paragraphs above printed, tore them from their context, tore them from each other, and set them up in bar of appellant's right of recovery, and attempted to justify this procedure by the unwarranted assertion that appellant is entitled to be compensated by its own government. It is submitted that a worse case of mutilation was never

seen, nor a more futile one, when Art. 297 as a whole is subjected to study and analysis.

As stated before, Art. 297 is found in Part X setting forth the "Economic Clauses" of the Treaty. By Article 243, which falls under Part VIII, dealing with Reparations, all of Section IV of Part X (including Article 297) is tied up with the Reparation Provisions. To consider intelligently the arguments advanced, the Court will find it necessary to read Article 297 and its Annex as an entirety, and also to read portions of Part VIII, especially Articles 231, 232, 233, 236 and 243, Annex III following Article 244, and Annex I following Article 244, all of which will be found in Appendix "B." Such a reading will demonstrate that Article 297 must be rejected, as repugnant to the plan adopted by the United States in carrying into execution the Treaty of Berlin.

First we point to Art. 243 of the Versailles Treaty:

> "The following *shall be reckoned as credits to Germany* in respect of her reparation obligations:
>
> "(a) Any final balance in favour of Germany under* * * Section IV of Part X (Economic clauses) of the present Treaty."

Therefore, inevitably, Section IV of Part X (which includes Art. 297) contemplates an accounting, and that if this yields a final balance in favor of Germany, the balance shall be reckoned as credits to Germany in respect of her reparation obligations.

By what procedure is this done? In brief, and in general, by the Allied and Associated Powers taking to themselves, primarily for liquidation and sale, although not necessarily so in every case, the

private property of German nationals found in their territories and crediting the *German State* with the value of the same against the *national obligations* which it assumes under the Versailles Treaty.

In detail, and necessarily at much greater length, the plan is as follows:

Article 297 taken as a whole provides:

(1) That the liquidation of enemy (Allied) property in Germany, where not completed, *shall stop*, and that restitution in specie shall be made of unliquidated property.

(2) That the liquidation of enemy (German) property in Allied and Associated countries *may* continue at the option of the Allied or Associated state concerned.

(3) That compensation shall be made to the nationals of the two sides who sustain private losses as a result of the liquidations.

Liquidations in Allied and Associated states, if continued, are to be carried out "in accordance with the laws of the Allied or Associated state concerned" (Art. 297 (b), and *that state must fix "the price or the amount of compensation in respect of the exercise of the right"* (to liquidate) "in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated." (Art. 297 (c).)

Nationals of Allied and Associated Powers may, in certain cases, have *restitution in specie* of their property taken in Germany, if that remains possible (Art. 297 (f).) If that is not possible they may be compensated by the grant of equivalents (Art. 297 (f) or by *cash payment* (Art. 297 (e).)

Regarding the liquidation of enemy property, Art.

297 divides the Allied and Associated Powers into three distinct groups or classes. It will be shown that the United States does not fall within either class. If this is shown, then it must be the case that the United States is not governed by Art. 297. For convenience the three classes of States set up by Art. 297 will be identified by numbers. They are as follows:

Class 1

(Described in 297 (h) (1):

Powers in which a Clearing Office has been set up pursuant to Sec. III of Part X. (Art. 296.)

Class 2

(Described in 2d paragraph (not numbered) of 297 (h) (2):

This class consists of "new States, which are signatories of the present Treaty as Allied and Associated Powers," and "States which are not entitled to share in the reparation payments to be made by Germany."

Class 3

(Described in 297 (h) (2), first paragraph):

Powers which do not fall within either of the foregoing classifications.

It will now be shown that the United States is not in Class I. Also, what results would follow from placing it in either Class 2 or Class 3. It is believed that this showing will result in the Court holding that it is not in either of those classes. And, of course, if it is found not to be in either class, then it follows that it is not governed by Art. 297 at all. (Later, the actual American plan will be shown).

The United States is not in Class 1 (Clearing System States). The setting up of a Clearing Office between the United States and Germany would have required that the United States give notice to Germany of its desire to do so within one month from the coming into force of the Treaty of Berlin (*i. e.*, November 14, 1921). This is established by a reading together of the following parts of the Treaties—Versailles, Art. 296, par. (e); Berlin, Art. II, par. (5), and Art. 440 of the Treaty of Versailles referred to in the paragraph of the Treaty of Berlin just mentioned. Such notice was not given and therefore the United States is not and cannot become a "Clearing System State."

Is the United States in Class 2? As it is not a new State, it can only fall within Class 2 by reason of being a State which is "not entitled to share in the reparation payments to be made by Germany." President Wilson and also Secretary Hughes have repeatedly announced that the United States has waived reparation. Also, at the Spa Conference of 1920 and the London Conference of May, 1921 (at neither of which was the United States a party), the reparation payments to be made by Germany were divided by the Allied Powers to the extent of 98½% of the total, leaving 1½% to be divided amongst other states, Poland and Rumania being expressly mentioned as recipients of this 1½%, although the language employed, would perhaps allow other states to share in it also. On the other hand, it may be that in consequence of the "Dawes Plan" and developments subsequent to and based upon it, the United States is now to be regarded as a Reparation State, (Class 3). The situation of the United

States, if placed in either classification, must therefore be considered.

For the purpose of argument the assumption first will be indulged, that the United States is *not* entitled to share, which would put it within Class 2, and it will be shown what the results of such a classification are. In Class 2 States, according to the provisions of 297 (h) (2), 2d (unnumbered) paragraph "the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under Articles 235 and 260, be paid direct to the owner." (For an instance of a payment direct to owner, ordered by a Tribunal established under this Treaty, see in Library of Congress, *Ellerman v. Etat Polonais*, Cause No. 1233, before German-Polish Arbitral Tribunal, Recueil des Decisions, des Tribunaux mixtes institues, par les Traitis de Paix, vol. IV p (in course of publication as this is written). Furthermore, "if on the application of the owner, the Mixed Arbitral Tribunal, provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudical to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State."

It is believed that this statement of the obligations imposed upon a Class 2 State is sufficient to cause this Court to hold that the United States is not in this classification. One or two illustrations to confirm this opinion will, however, be given.

First: Our Trading with the Enemy Act provides (last paragraph of Sec. 12) that German property taken by the Alien Property Custodian shall be disposed of after the War in such manner as Congress shall direct. In Class 2 States it *must* be disposed of according to the provisions of the Versailles Treaty just quoted. That is, subject to the prior rights of the Reparation Commission, *it must be paid direct to the owner.* The Court will not suffer the Trading with the Enemy Act to be thus impaired by a Treaty which the Senate of the United States refused to ratify.

Aside from the lack of ratification there are positive legal obstacles in the *Treaty of Berlin* and the Senate reservation to its ratification. The Treaty of Berlin provides (Art. II, par. (4)):

> "That, while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so."

And the Senate reservation attached to the ratification of this Treaty provides:

> "That the United States shall not be represented or participate in any body, agency or commission, nor shall any person represent the United States as a member of any body, agency or commission in which the United States is authorized to participate by this Treaty, unless and until an Act of the Congress of the United States shall provide for such representation or participation."

Of course it is not for the Judicial Department of the Government to elect whether the United States shall take advantage of its rights to participate in the Reparation Commission; and, equally of course, the Judicial Department must take notice that no Act of Congress such as is contemplated in the Senate reservation just quoted has been passed. Therefore the Court cannot hold that the United States is a Class 2 State, because to do so would be to recognize rights in the Reparation Commission.

Second: In Class 2 States, the Mixed Arbitral Tribunal (which is another of the bodies which the Berlin Treaty and Senate reservation forbid the United States to have aught to do with) has the power, on application of the German owner, to award damages against a Class 2 State for having sold his property under circumstances "unfairly prejudicial to the price obtained." Let us see what definite application this would have if the United States were a Class 2 State.

In *U. S. v. Chemical Foundation,* 294 Fed. 300, the United States sought by a bill in equity to recover certain dye and chemical patents sold by the Alien Property Custodian. It asserted in its bill of complaint that the sale was made for a grossly inadequate consideration ($250,000, although all concerned on both sides admitted an actual value of millions of dollars), and it is asserted (in legal effect) that the inadequacy of the price was due to "conditions of sale or measures" * * * outside general legislation which were "unfairly prejudicial to the price obtained." In short, the United States asserted that sellers and buyers were the same persons, that the price was fixed arbitrarily without regard to val-

ue, and, to put it baldly, that fraud was practiced and the Statutes of the United States violated.

In an international tribunal the United States would be bound by these solemn allegations of a sworn complaint filed in Court by the chief law officer of the Government. Therefore, if the United States is a Class 2 State, the way is open for the former German owners to apply to the Mixed Arbitral Tribunal for relief. Their case would seem to be complete by the introduction of a copy of the Government's complaint in the *Chemical Foundation* suit and a copy of the judgment of a competent American Court holding the United States to be a Class 2 State. Nothing would remain but to determine the amount of the compensation which the Mixed Arbitral Tribunal should award in favor of the former German owners and against the United States.

Counsel is confident that in the light of the foregoing illustrative case this Court will not hold that the United States is a Class 2 State under Art. 297. To do so would be to run directly contrary to the quoted provisions of the Berlin Treaty and Senate Reservation.

Alternatively the assumption is indulged, again for the purpose of argument, that the United States *is* entitled to reparation and therefore would fall under Class 3, and the results of such a classification will be shown.

In Class 3 States the provision of the Treaty of Versailles is that (297 (h) (2), beginning the middle of the paragraph) "the proceeds of the property, rights and interests, and the cash assets of German nationals received by an Allied or Associated Power,

shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and *if retained the cash value thereof shall be dealt with as provided in Article* 243."

What does this language mean? First, if the United States is a Class 3 State the proceeds of German property would be subject to disposal by it "in accordance with its laws and regulations." Such proceeds *might* be applied in payment of claims of American nationals based upon German exceptional war measures, or the claims enumerated in paragraph 4 of the Annex, but could be used otherwise if the laws and regulations of the United States otherwise provided.

But how would the amount of these American claims and debts be established? According to paragraph 4 of the Annex, "the amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal." Art. 297 affords no other way of having the amounts ascertained.

Such proceeds *might* also be retained by the United States, *but if retained the cash value thereof must be dealt with as provided in Art.* 243 (that is, must be "reckoned as credits to Germany in respect of her reparation obligations;" and therefore, according to Article 237, would have to be divided

by the United States with the other allied and associated powers.

It appears therefore that if the United States is placed in Class 3, the results are as follows:

(a) That the amounts of the claims of Americans against Germany and German nationals are to be ascertained by an arbitrator appointed by Mr. Ador or by the Mixed Arbitral Tribunal, both of which are agencies which the Treaty of Berlin and Senate reservation thereto forbids the United States to have dealings with except by authority of an express Act of Congress, and so far there is no such Act of Congress.

(b) The provision of the Trading with the Enemy Act, above mentioned, declaring that the German property taken by the Alien Property Custodian shall be disposed of after the War in such manner as Congress shall direct, is once more impaired. That is to say, by way of illustration, under the Trading with the Enemy Act Congress has a right to devote the proceeds of the property taken by the Alien Property Custodian to the purpose, for instance, of establishing a university as a great war memorial; or to the purpose, for instance, of paying adjusted compensation to those who served in the late War.

Either of these plans, or in fact any other plan for the disposition of the property taken by the Alien Property Custodian, is open to the Government under the reservation of its rights contained in the Trading with the Enemy Act. In a word, under the Trading with the Enemy Act, which is American law, the Government has fully reserved its rights regarding the ultimate disposition of the property taken by the Custodian. With regard to such prop-

erty, it may *retain the same without making any accounting to anybody*. But if the United States is a Class 3 State, under Art. 297, it cannot retain any property taken by the Alien Property Custodian without *paying or crediting the cash value thereof* on account of German reparation (principally for the benefit of European powers) as provided in Art. 297 (h) (2).

In the light of this demonstration the Court will of course not hold the United States to be a Class 3 Power.

The result is therefore reached that Art. 297 does not govern the United States in this matter, because the United States is not in either of the three classes into which Powers governed by Art. 297 are divided, and therefore the Article provides no rule or method under which the United States could deal with German property.

With the United States not governed by Art. 297 at all, it seems hardly worth while to point out the special inapplicability of certain provisions thereof upon which the Government (in the court below,) chiefly relied. However, a few lines on this subject may be of interest to the Court, as it is clearly demonstrable that these provisions do not have the meaning or effect which the Government assigns to them, even if any part of Art. 297 were to be considered as applying to the United States.

The Government invokes par. (d) of Art. 297, by which Germany confirms the "exceptional war measures or measures of transfer" of the Allied and Associated Powers. The meaning of the quoted words is defined in par. 3 of the Annex to Art. 297. By referring to these definitions it appears to be very

doubtful whether the taking of the ships was an "exceptional war measure," or was a "measure of transfer." However, whether the taking of the ships did or did not constitute measures of the kind described, the provision of 297 (d) affords no ground of objection to these claims for compensation, *for the reason that the validity of the transfer of the title to the United States is not contested by the former owners, but, on the contrary, is assumed. We do not question the Government's title. We simply claim the compensation, the right to which flows out of the taking of title by the Government.*

The Government invokes par. (i) of Art. 297, respecting Germany's undertaking to compensate her own nationals, etc. This obligation by no means applies in all cases. For instance, in regard to Class 2 States (as herein called), this paragraph is meaningless, because those States are *required to pay the proceeds of liquidation direct to the former German owners. See Ellermann v. Etat Polonais,* (supra). Where the obligation does apply it is only for the reason that the correlative provisions of Art. 297 result in the *German State* getting full credit on its *national reparation obligations* for the value of liquidated German private property. If a given Power does not deal with German private property in its territory in such manner as to give the *German State* this benefit, the obligation on the part of the German State to compensate its nationals never arises. The reason ceasing, the law ceases with it. The contemplated consideration to Germany not moving to it, the mutual or reciprocal obligation undertaken by Germany to compensate its nationals never comes into force. Hence appellant in this

case has no claim against its own government for the value of its Ships expropriated by the United States, and, unless entitled to compensation from the United States, is entitled to no compensation at all, and can recover none.

The Government also invokes par. 2 of the Annex to Art. 297. Reading this entirely by itself it would seem to bar all claims. Reading it in connection with its context (the entire Article and Annex) it has by no means so broad an effect, and, especially, it appears to have no application at all in the present case.

It would be senseless to pretend that this provision has the meaning that no former owner of liquidated property shall have a claim for the payment of liquidation proceeds, because only a few paragraphs before (297 (h) (2) 2d (unnumbered) paragraph) certain States (those herein called Class 2) are *required* to pay the proceeds of liquidation direct to the owner. And the owner is *authorized* to prosecute a claim for damages against the State in question before the Mixed Arbitral Tribunal, on the ground that the sale or measures taken by the Government in question were "unfairly prejudicial to the price obtained."

This provision of par. 2 of the Annex has to be understood in connection with the rest of the provisions of Art. 297 and the Annex. Art. 297 (e) authorizes Allied and Associated Powers to claim against Germany not only payment of the proceeds of their property which Germany has liquidated, but also particular claims for damages resulting from German exceptional war measures. Art. 297 (f) entitles Allied subjects to claim from Germany

in certain cases restitution of property in specie instead of compensation by payment of the liquidation proceeds. The last part of paragraph 1 of the Annex renders void German liquidation measures in occupied territories, and measures taken after November 11, 1918.

The real meaning of par. 2 of the Annex is that German nationals must be satisfied with the amount of the liquidation proceeds realized by Allied Powers of the class herein described as No. 1 and No. 3, and cannot make particular claims for damages, as may be done in regard to property liquidated in Class 2 States, and as Allied nationals may do under 297 (e) as against Germany.

That this is the interpretation which the Allied Powers have put upon par. 2 of the Annex clearly appears in the case in the French-German Arbitration Court of *Societe Vinicole de Champagne v. Consorts Mumm,* decided October 24, 1921 (Recueil, Vol. 1, pp. 694). In this decision the claim of the Mumm firm (German) for avoidance of a French war measure and damages resulting therefrom was rejected, while its claim for the payment of liquidation proceeds (85,000,000 francs) was not disputed.

Now, since the purpose and effect of par. 2 of the Annex is only to compel Germans to be satisfied with the liquidation proceeds (in States other than Class 2) and to bar them from claiming *additional damages* suffered as an incident to liquidation, it necessarily follows that par. 2 has no application at all in the present case, *for the reason that the present case does not at all involve a liquidation.* The German ship property has not been liquidated in the sense in which that word is used in the Treaty of Versailles.

Title to it has been taken by the United States. Some ships have been sold, but in such cases the proceeds of sale have not been paid to the Alien Property Custodian, or to the Treasurer of the United States, as in the case of property taken under the Trading with the Enemy Act, to await Congressional action after the end of the war; but such proceeds have been received and used by the Shipping Board in conformity with the Acts of Congress which give the Board, for its authorized purposes, the moneys which it realizes from the sale of ship property. (See Sections 4, 5, 6 and 11 of Merchant Marine Act of June 5, 1920, Ch. 250, 41 Stat. at L. 988.)

The foregoing is thought to establish (1) that Art. 297 is not law for the United States; and (2) that even if it were so, its par. (i) and par. 2 of its Annex would have no application in the present proceeding.

For the purpose of confirming the assertion that Art. 297 is not law in the United States, its repugnancy to the plan (more advantageous to itself) which the United States has adopted as its law in the premises, will be shown in another manner:

Under date of August 10, 1922, the United States and Germany entered into an agreement "for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded between the two Governments under date of August 25, 1921." This Agreement, and the diplomatic notes exchanged between the two Governments and appended to the Agreement, appear in 42 Stat. at L., part 2, p. 2200, and are printed as Appendix "D" to this brief. Their pertinent provisions are also set forth in

parallel column alongside of the inconsistent provisions of the Treaty of Versailles, as follows:

Treaty of Versailles, Art. 297, Annex 1 Thereto and Reparation Provisions, Especially Arts. 231, 232, 233, 243 and Annex 1, (with especial reference to American nationals)	Law of the United States as Established by Peace Resolution, Treaty of Berlin and Agreement of August 10, 1922, as Interpreted by Diplomatic Notes Thereto Appended.
Scope.	*Scope.*
(Introductory phrase of Art. 297)	Introductory phrase of Agreement)
"The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto."	"The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission * * *."

Claims Admissible.	*Claims Admissible.*
Art. 297 and Annex 4.	Treaty of Berlin.
Those of American nationals.	
1. For compensation in respect of damage or injury inflicted upon their property, rights or interest in German territory, including claims for the restitution of said property in specie.	1. Same.
Competent: Mixed Arbitral Tribunal.	Competent: Mixed Claims Commission.
2. For debts owing to them by German nationals.	2. Same.
Competent: Mixed Arbitral Tribunal and National Courts of the Allied, Associated or Neutral Powers.	Competent: Mixed Claims Commission.
(Art. 304 (b), par. 2.)	
3. For claims growing out of acts committed by the German Government, or by any German authorities since July 31, 1914, and before the United States entered into the war.	3. Same.
Competent: Mixed Arbitral Tribunal.	Competent: Mixed Claims Commission.
4. For amounts due in respect of claims with regard to the property, rights and interests in the territory of Germany's former allies.	4. Same.
Competent: Mixed Arbitral Tribunal.	Competent: Mixed Claims Commission.

Effect on Law of United States Existing Prior to Treaty of Versailles.

A. By superseding or repealing it:

The application of any one of the three alternative plans provided in Art. 297 for the three classes of states there described, would be in conflict with and hence, if followed, would supersede or repeal by implication, the provision of the first sentence of the last paragraph of Sec. 12 of the "Trading with the Enemy Act" (40 Stat. at L., 424) that "after the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct; * * *"

Effect on Law of United States Existing Prior to Treaty of Versailles.

A. By superseding or repealing it:

Nothing in either the Peace Resolution, the Treaty of Berlin or the Agreement of August 10, 1922, supersedes or repeals any prior existing American law. This new matter is all cumulative or supplemental.

B. By supplementing it:

Annex 4 to Art. 297 would permit German private property in the United States to be used to pay the claims of American nationals against enemy countries other than Germany, thus applying the property of A to the payment of the debt of B, in plain violation of all American legal conceptions.

B. By supplementing it:

The supplemental engagements are the natural ones, providing first—(Peace Resolution and Treaty) that German property which has come into possession or under control of or has been the subject of a demand by the United States "shall be retained and no disposition thereof made" until Germany shall have "made suitable provision for the satisfaction of all claims" of American nationals; and second—(Agreement) the amount of the American claims shall be ascertained in the manner agreed upon.

Obligations imposed upon the United States.

By Art. 297, the United States would be obliged either (1) to return German property or the proceeds of liquidation thereof to the former owners; or (2) to apply the same in payment of the claims of American nationals against Germany with any resulting balance left over going to Reparation account under Art. 243; or (3) if it retained the property or proceeds of liquidation, in whole or in part, to pay the value of that retained to the Reparation Commission under Art. 243. The result once more would be to impair the provision of the Trading with the Enemy Act quoted above.

Obligations Imposed Upon the United States.

Neither the Peace Resolution nor the Berlin Treaty nor the Agreement of August 10, 1922, impose any new obligations upon the United States. Obligations previously resting upon the United States are left as before. Options and reserved rights to make future decisions (as, for instance, in the Trading with the Enemy Act, Sec. 12) continue to be reserved under these documents.

Method of Ascertaining Amount of Claims.

(Art. 297 (e) and Annex (4).)

Amount would be determined by Mixed Arbitral Tribunal provided for in Sec. VI of Part X, Art. 304 of Versailles Treaty or by an arbitrator appointed by said Tribunal or by an arbitrator appointed by Mr. Gustave Ador.

Method of Ascertaining Amount of Claims.

(Agreement, Art. II.)

Each Government appoints one commissioner. The two Governments jointly appoint an umpire to decide cases in which the commissioners disagree.

Procedure of Ascertaining Amounts.	*Procedure of Ascertaining Amounts.*
No provision contained in Art. 297 or its Annex. Sec. VI contains some provisions regarding the procedure of the Mixed Arbitral Tribunal but no provisions regarding procedure before arbitrators appointed by Mr. Ador.	(Agreement, Art. IV.) The commissioners keep accurate records. (Art. VI) Each Government may be represented by agents and counsel who may present oral and written argument.
Time Limitations for Presenting Claims.	*Time Limitations for Presenting Claims.*
Under Art. 297 and Annex, none.	Under diplomatic notes appended to agreement, six months.
Applying German Private Property to Payment of Reparation Obligations of German Government.	*Applying German Private Property to Payment of Reparation Obligations of German Government.*
Art. 297 requires the application of German private property to these obligations, which are set forth in Annex 1 to Art. 243, after satisfying prior claims, unless the property or its proceeds is paid back to its owners. Attention is especially called to military pensions, maintenance of prisoners of war, and allowances to families of soldiers, etc., as defined in paragraphs 5-7 of said Annex, which are included in the reparation obligations of the Treaty of Versailles.	In Ambassador Houghton's note appended to the Agreement, it is distinctly stated that the pensions, maintenance charges and family allowances mentioned in the opposite column under this heading are excluded. Our Ambassador's note, read in connection with the German Chancellor's note to him which called it forth, raises a strong presumption that all reparation claims are excluded, as these notes limit American claims to those covered by the Treaty of August 25, 1921, which is silent as regards reparation.

Place and Time of Meeting of Arbitrators.	*Place and Time of Meeting of Arbitrators.*
Not definied by Art. 297 or its Annex.	According to Agreement, Art. III, the commissioners are to meet at Washington within two months from the coming into force of the agreement.
Expenses.	*Expenses.*
No provision in Art. 297 or its Annex.	Agreement, Art. V, each Government bears its own individual expenses. Joint expenses are shared equally.
Contemporaneous Construction as Evidenced by Acts of the United States.	*Contemporaneous Construction as Evidenced by Acts of the United States.*
In annexing to the Resolution ratifying the Berlin Treaty the reservation previously quoted, the United States plainly showed its intention not to subject itself to the power or authority of the Mixed Arbitral Tribunal, of Mr. Gustave Ador, or any appointee of his, or of the Reparation Commission. The law of the United States forbids that the United States shall have aught to do with any of these agencies unless and until an Act of Congress expressly authorizes it.	The Court will take judicial notice of the fact that a Mixed Claims Commission and umpire are now functioning, having been holding sessions in Washington for a long period of time past and having handed down a number of important decisions, and being now, it is said, approaching the end of their labors, by the conclusion of the matters referred to them by the two Governments for settlement.

It is respectfully submitted that the Court cannot read the above matter, set forth in parallel columns, and fail to reach the conclusion that the American plan is so inconsistent with the plan of the Treaty

of Versailles that the latter document must be laid aside and the decision of the Court based on the American law.

To refer once more to the various classifications as stated in the Treaty of Versailles, if the American law, set forth in the right-hand column above, is studied, it appears that the United States is not in either of the three classes established by Art. 297. The situation of the United States is different from all three. The United States has maintained intact the individual claims of Germans for property taken into custody and the proceeds of such as has been sold, carrying in the office of the Alien Property Custodian a separate trust account for each individual whose property was taken under the Trading with the Enemy Act. The United States has not confiscated these accounts, nor applied them to the payment of American claims against Germany, nor provided for paying them into the reparation fund. As a matter of fact the United States has already provided for a return of a considerable part of the seized property, and for the payment of interest on the part not returned. Sec. 9 of the Trading with the Enemy Act was amended by an Act passed March 4, 1923, Ch. 285, Sec. 2. (42 Stats. part 1, p. 1511). The Amendment provides (subdivision 9) for the return to former enemies of property taken by the Alien Property Custodian, or the proceeds of property sold, if the same does not exceed $10,000 in value, and if it does exceed that sum, then for the payment of $10,000 on account. Furthermore, by the same enactment, the Alien Property Custodian is directed to pay to former enemies "the net income, dividend,

interest, annuity or other earnings, accruing and collected thereafter on any property *held in trust for such person* by the Alien Property Custodian or by the Treasurer of the United States for the account of the Alien Property Custodian," (Italics are counsel's), provided that the amount of interest to be paid to any single person shall not exceed $10,000 per annum. The Court will take judicial notice that pursuant to this authority the Alien Property Custodian has already paid out large sums of money in several thousand individual cases, and is continuing to do as rapidly as claims can be properly checked up and verified. Meanwhile the United States holds accounts in excess of $10,000 subject to the future action of Congress pursuant to the rights reserved in Sec. 12 of the Trading with the Enemy Act. This procedure is independent of the three alternative plans provided for in Art. 297 of the Treaty of Versailles and different from all of them, and serves to prove once more that the United States is not governed by the provisions of that Article relating to liquidation of enemy property. By plain implication Congress discloses that the United States is trustee of the funds held by the Alien Property Custodian, and that the Germans whose property was taken in charge by the Custodian are the beneficiaries of this trust—a situation wholly incompatible with the confiscatory provisions of the Treaty of Versailles.

CONCLUSION.

While its Government and ours were at peace appellant brought into our harbors, as ports of refuge, to escape capture by its then enemies, 29 ships. Later appellant's Government and ours came also to be at war, and the United States acquired possession and absolute ownership of the ships by measures taken in pursuance of a law which, without distinction, authorized the taking of vessels belonging to citizens, to allies, to neutrals, and to enemies; *making the test of the right to take, not enemy ownership at the time of taking, but German ownership at the time—two and a half years earlier—of entrance into our waters.*

At the conclusion of the war, the appellant's Government and the Governments of certain of the Allied Powers entered into a treaty in which the United States did not join and the provisions of which do not, in any event, extend to the ships which the United States acquired from appellant.

Appellant, relying upon Section 145 of the Judicial Code granting general jurisdiction to the Court of Claims, and Section 155 authorizing aliens to maintain suits in that Court if their Government accords a like right to American citizens, brought this suit after peace had been restored between the two countries.

The narrow question on which the case turned in the Court below was this: "Had the Court jurisdiction to entertain the suit?" But the case necessarily involves the broader question: "Were appellant's ships confiscated?" The Court below said that it was not necessary to answer this question. If, how-

ever, the decision of that Court is affirmed, the question is answered, and necessarily answered in the affirmative.

The Joint Resolution does not provide for confiscation. Members of Congress debating the measure expressly said that it was not a confiscatory act, but that compensation would be paid and that the Court of Claims would be open to the ship owners as soon as peace should be restored. This was a natural presumption, as war, in its effect upon relations between private parties, has for a long time uniformly been held not to annul or destroy rights of action, but merely, while it endures, to suspend them; and sections 145 and 155 of the Judicial Code afford no ground for supposing that the Government, when waiving its sovereign immunity and consenting to be sued, intended that any other rule should apply in suits against it.

A high official of the State Department has since said that the measure "contemplates the payment of compensation." Secretary of State Hughes, reaffirming the declarations of earlier American statesmen, has declared that all nations are bound to respect the property rights which foreigners acquire by bringing property into the country lawfully in time of peace. In the *Chemical Foundation* suit the United States has contended that its policy in the late war was not a confiscatory one.

It is impossible to exclude appellant from the Court of Claims on the ground that the taking was a tort. It was done under orders of the Executive head of the Government, who was duly authorized by an Act of Congress. This renders the tort theory impossible. It was contended in the Court below

that the Treaty of Versailles, the Peace Resolution of July 2, 1921, and the Treaty of Berlin constituted a bar to the action, but that contention has been shown to be groundless.

On the part of the appellant it has been shown that its ships were taken by process of eminent domain, and that such a taking entitles it to compensation, unless it is to be held that, *ipso facto,* and without a word from Congress, the property of aliens situate in this country is upon the outbreak of war between our country and theirs immediately deprived of the protection of the Constitution and laws. This, in effect and at bottom, is the doctrine enunciated by the Court below. It runs contrary to the decision of this Court in *Brown v. U. S.* and to what our statesmen from Hamiilton to Hughes have declared to be the law and policy of this country. For this Court to set the seal of its approval upon such a doctrine would be equivalent to the United States giving notice to the world that when it becomes involved in war with any country, the property of citizens of that country situate here is to be regarded as no better than booty, and that even though Congress shall pass an Act which in the same words gives the executive discretionary power to take such property and like property belonging to citizens, and requires an appraisal of anything taken which "shall be competent evidence in all proceedings on any claim for compensation," the courts will, despite the statute, hold an enemy owner to be without a remedy or a forum, even after peace has been restored. It would also be notice to the world that the doctrine of *Brown v. U. S.* is no longer in force, and that instead of enemy private property being entitled to

the protection of law unless Congress declares otherwise, it is to be considered as deprived of the protection of law even although Congress, by plain implication, extends such protection to it. It would be notice also that the rules adopted at the Second Hague Conference are, in practice, rejected here, although the United States refused to approve them at the time of their adoption for the reason that what they accorded to private enemy ships as privileges, the United States already looked upon as *rights*. In a word, an affirmance of the decision of the Court below upsets all conceptions hitherto held concerning the law and the policy of the United States as respects the treatment to be accorded the property of foreigners, situate here, in the event of war between our country and theirs.

For the reasons stated, it is respectfully submitted that the decision of the Court of Claims ought to be reversed.

EDGAR W. HUNT,
Counsel for Appellant.

APPENDIX "A"

EXTRACTS FROM DEBATES ON JOINT RESOLUTION No. 42.

Congressional Record, Vol. 55, Part 2, 65th Congress, First Session, May 7, 1917.

Mr. Alexander, Chairman of the House Merchant Marine Committee, said, on page 1903:

> "We could compensate the Hamburg-American and the North German Lloyd Steamship Companies for these ships; if we pursue our policy in the future as in the past we will compensate these owners for these vessels, but at this time, early in the war, and with conditions changing from day to day, the equities shifting, it will be time enough, in the view of the Senate and in the view of the administration and in the view of the Committee on the Merchant Marine and Fisheries, to adjust these equities after peace has been declared, because in the meantime we will no doubt have property destroyed; we will have counter claims against Germany; and it will be time enough to do so then."

He concludes his statements, on page 1909, by saying:

> "It should be evident to all mankind that our Government, in the conduct of the present war, will be governed by those broad principles of humanity and justice that have given luster to our flag."

Mr. Rowe of New York says, on page 1919:

> "Such seizures are made in most of the States of the Union, and afterwards they settle the bill. We even take real estate in my State

and afterwards condemn the property and find the value. It is done when the real estate is wanted and wanted immediately. Here is something that we want. We must have ships that can carry freight and soldiers from this country and Canada to Europe.

"There is no man in this House to-day that wants us to take advantage of the private citizens of the United States or the private citizens even of Germany. They must and will be paid. We do hold, however, that no money that is paid for these vessels should be transferred to any German citizen or to the German Government before this war is closed."

Mr. Stafford of Wisconsin states, on page 1919:

"I fully approve of the policy that is provided for in this bill for the Government to appropriate these foreign interned ships, but I also wish to advocate the duty of the Government to pay those rightful owners, whoever they may be, for the use of those ships."

He further adds, on page 1919:

"It is so well established in international law that the property of foreign subjects domiciled in this country at the outbreak of war is beyond seizure, except for the purposes of the Government, and if taken by the Government they must be compensated for it. That principle is akin to that providing compensation for these interned ships; that being interned here, the owners not having the privilege of leaving port except by rushing into the jaws of destruction, are entitled to have their rights conserved and recognized in the courts of this country. And I make this

claim, that if Germany accords to our citizens in their courts the same right to sue the Government as is accorded aliens in the Court of Claims, if she accords them reciprocal rights, then these foreign subjects, upon the seizure of their property, have the right to go into the Court of Claims and prosecute their claim for indemnity or for the return of the property. I shall not take up the time to call the attention of the committee to the clauses under the judicial code that authorize such procedure. In another body, when this resolution was suddenly presented for consideration, reference was made to the case of United States against Russell, Thirteenth Wallace, page 623, as justifying our action in appropriating these private vessels. I wish to read from that decision, which has been many times referred to approvingly in subsequent decisions of the Supreme Court, and to call attention to the principle which I am enunciating here, that if we confiscate this property for war's ends—and I claim that is the only justification, because of the need at the present time to assist our Government in this war in the transportation of munitions and troops—then we must recognize the rights of property, and the owners are entitled to be reimbursed by our Government."

He states further, on pages 1919 and 1920:

"Undoubtedly we would have a right to confiscate them if they were public vessels of the enemy, but as these vessels are the private property of subjects of the alien country, we

should in conscience reimburse them, just as under international law we are bounden to reimburse Germans or Austrians in this country in case the Government should have need to take for war purposes any of their private property. Why, no one claims that bonds, money, or any other property of foreigners domiciled in this country can be taken by the Government without the owners being compensated. If the Government would appropriate the product of a woolen mill owned by German aliens domiciled here, the Government would certainly be obligated to pay for the property taken. The mere fact that the woolen goods were seized by German warships as contrabrand would not impair the rights of the original owner to compensation for his property. So with these private vessels, though they are movable, nevertheless they are private personal property. They are the private property of these stockholders, just as bonds owned by enemy aliens in this country are their private property; and if perchance they are destroyed by a submarine attack of the enemy that does not destroy the rights of these alien owners to their rights of property, which are recognized in international law.

"Under this resolution, exercising the war powers of Congress, we are appropriating the property of foreign subjects, but I contend that we should compensate them for that property. And no matter what consequences may befall the use of that property, we are appropriating it for the use of the Government, and their private rights can not be affected by a use over which it has no control."

Mr. Bankhead interrupted Mr. Stafford to ask, on page 1920:

"I will ask the gentleman from Wisconsin if he can find in either one of the sections of the joint resolution as reported to the House a denial of the principle he is arguing for?"

Mr. Stafford replied, on page 1920:

"The bill provides, in section 2, for the means whereby the Secretary of the Navy may appraise the property that is taken over and says that that appraisal shall be considered as competent evidence in all proceedings hereafter authorized in any claim for compensation. That rather presupposes that some person somewhere will make a claim for damages."

Mr. Hardy of Texas confirmed that the power then exercised was the power of eminent domain, page 1921:

"This bill simply sets in motion the power of eminent domain of the Government to take the property of an alien or of a citizen, and the Government has the right in a case of public necessity arising from war to take over the property of its own citizens, and certainly no less the property of any other resident human being within its borders."

He added, page 1921:

"Section 2 provides for a survey and estimate of the value of the ships taken over. It does it in order that that survey might be held as prima facie evidence of the facts; that is, of the value of the ships when taken over. It does not undertake to decide the matter or manner of compensation now."

* * * * *

"I want to say that, so far as our policy as a nation is concerned, from its foundation it

has never been a policy of ruthless power. We have never intended, never desired, and never will desire to wrongfully take the property of citizens of any nation, even though we are at war with that nation. It has been our policy that any property which comes rightfully within our jurisdiction will have all of the rights of its owner preserved, and when this war is ended there will not be a German right which will be violated by the American people, and I believe I know this Congress well enough to know that it will never use its power to take from any man, German, Austrian, Englishman, Frenchman, or American, any right that justly belongs to him, but we do not propose to settle up the claims that should be settled by the German Government for and with its citizens before we know what Germany will do with American rights."

He states, on page 1922:

* * * "but it is a well-recognized fact that under the right of eminent domain the Government takes the things necessary for its defense."

Mr. Small of North Carolina states, on page 1922:

* * * "I am in favor of this bill which appropriates the interned ships of Germany, with which we are at war. I think it can be justified upon the ground of emergency and necessity, but at the same time I do not believe there should remain the slightest question that there should be compensation to the owners of these ships to the extent of their value as of the present time."

He also states, on page 1922:

"Mr. Chairman, the President has said, and I take it it is the sentiment of every intelligent

and just-minded citizen in our country, that the private property of alien enemies within the United States shall be scrupulously respected and preserved. These ships in large degree, if not altogether, are the property of residents or citizens of the Imperial German Government. Simply because this property consists of ships instead of money in bank or real estate located here, or buildings, or movable personal property, does not in my mind differentiate them so as to apply a rule of right to one and not to the other."

Mr. Edmunds of Pennsylvania says, on page 1923:

"I am sure there was no intention to confiscate this property. It was simply left open for adjudication at an early date."

* * * * *

"We take the ships. We have arranged to leave the question of compensation open. The treaty is here. Undoubtedly all those questions will be brought up when this case will be adjudicated in the Court of Claims, where they have a right to take it.

"In the case of Wagner against The *Juniata,* Twenty-eight Federal Cases, page 3821, the Court reaffirming the principle stated by Chief Justice Marshall, said:

" 'In respect to the vessel herself, now in the port of New Orleans, I consider the reasoning of the Court equally strong against the claim of the libellant; she is to all intents and purposes property as much infra-territorial, within the limits of the United States, as the cargo placed in store a few hundred yards from the shore where she is moored; and she can with no more reason be said to be beyond the territorial limits of the United States than

the river upon whose waters she is now floating.'

"Now, gentlemen, undoubtedly the committee, realizing that the Government needed these ships, has taken the best course that it is possible to devise to take possession of them at this time, and has left the question entirely as to how they were to be settled for open for the future."

* * * * *

"Now, gentlemen, you will see that the House and the Congress has at all times stood for fair compensation for anything it has taken belonging to anybody else, whether belonging to our own citizens or to foreign citizens. I think we can afford to pass this resolution and leave it to the Court to pass upon in due time what we are to pay for these ships."

Mr. Slayden of Texas says, on pages 1923 and 1924:

"The purpose of Article XIII was to mitigate the horrors of war and to compel respect for the rights of property of private citizens and to secure decent treatment for individuals forced to reside in an enemy country.

"I am convinced that section 2 of this resolution designedly recognizes that obligation in the words that permit a board of survey to be appointed to value this property that we are about to appropriate to our military use.

"It is a recognition of the fact that the obligations of the three treaties to which I have referred—of 1785, 1799 and 1828—still bear on us, are still to be respected in principle; and I am delighted to know that the chairman of the committee (Mr. Alexander) was wise enough to have those obligations recognized in the way he did, and incorporated in the resolution itself."

He concludes his remarks, on page 1924:

"We cannot build up civilization, we cannot provide anything like a reasonable scheme for the maintenance of peace between the governments of the world unless we do respect that principle; and I would like to have it known to the whole world that it is the opinion of the American Congress, without additional legislation being necessary, that private property rights that were undertaken to be cared for in the three treaties I have mentioned are to be respected, and that the United States, at least, is going to conduct its war upon the basis of justice to private citizens; and that after the war is over we stand willing actually, in spirit and in fact, to help the world re-establish itself on a basis of sanity, and meantime we are going to keep the faith to which we are plighted.

"Mr. Chairman, the fact that treaties have been broken and that people who were our friends have now for the time being become our enemies ought not to cause us to set aside all the decent and well-conceived laws of the past for the recognition of their rights and the governing and protection of personally innocent and unoffending individuals. The most distressing feature of the situation in this country is the intolerant spirit shown by some of our people. Regardless of treaties I have heard a demand that we should take the property of Germans in the United States. Because a man has the temerity to stand up and plead for justice to citizens of an enemy country, who unfortunately happen to be here, he is frequently denounced as pro-German; because he merely stands for reason, for common sense and for recognition of the principles that this Government has stood for from the be-

ginning, and which I am proud to say I believe it will stand for until the end. These intolerant people, these people who believe it to be the duty of every citizen to hate the individuals of another country with which his is engaged in war, have been manifesting a hostility that is not creditable to them as men, and certainly if shared in by this Government as a political entity will reflect no credit upon it."

Mr. Hadley of Washington says, on page 1924:

"I desire to draw the attention of the committee directly to what the resolution provides in terms. It provides that the Secretary of the Navy shall appoint a board, with the approval of the President, to make a survey of the vessels which it is proposed to take over, with a view to determining their actual value at the time they are taken; and not only the vessels but the equipment and appurtenances and all property contained therein at the time of the taking. And what is the purpose of that survey? It is in order that it be preserved as a permanent record for future use in the event it should become necessary to consider the question of compensation. It is to be preserved, and to be submitted in any court of competent jurisdiction that may deal with that subject. That is expressly provided by the resolution.

"It is true that the resolution does not in terms declare that compensation shall be paid. It is equally true that it does not either declare or intimate that compensation shall not be paid. It simply provides the present machinery whereby the evidence of value shall not only be ascertained but that it shall be preserved; and having been ascertained and preserved, it makes it mandatory, in the terms of

the resolution, that such evidence shall be recognized as competent proof in any court having jurisdiction."

* * * * *

* * * "In addition to the preservation of the record for court procedure, it will be useful in the determination of questions arising on the treaty of peace that may be entered into at the conclusion of the war, and, as suggested by the gentleman from Texas, will show the resolution and purpose on the part of the Government to recognize the claim for damages in case the party has a right to it."

He also states, on page 1925:

* * * "I hope, gentlemen, considering the resolution will not lose sight of the fact that, while the committee did not attempt to provide the machinery for the final solution and determination of the matter, it did not ignore the fact that compensation might be had."

Mr. Campbell of Kansas states, on page 1925:

"I do not agree that any settlement should be made at this time with the owners of these ships; but the owners of these ships need have no fear; they need not look forward to a time when the war shall have been ended to any difficulty they will have in getting justice from the United States. As to whether or not these ships shall become the victims of submarines at the hands of the German Government raises a question that will no doubt enter into the settlement of the matter of the payment for these ships; but the Government of the United States has always maintained its position of adhering with the strictest account to every treaty that it has entered into and to every obligation that it has assumed or that is thrust upon it, and that will be true with respect to

these ships and to every incident growing out of this war as it has with respect to every other. The owners of the ships and the German Government may well look back to the action of the United States at the termination of the Spanish-American War, when this Government did more than was really expected of it by the vanquished."

* * * * *

"That is all I had in mind to say, and I would not have stated it if it had not been that it has seemed to me there has been some anxiety here for fear that the Government of the United States would take advantage of its power in the premises and in the final conclusion not do justice by the owners of any property it may seize for war purposes."

Mr. Lenroot of Wisconsin says, on page 1929:

"I do not say for a moment that we ought not to compensate the owners of these ships."

Mr. Fess of Ohio states, on page 1930:

"But the second section suggests that it is to be requisition, or at least it lays the grounds for it, since it there provides for a board of survey to ascertain the values of these vessels. It does not specify just why that is done, but all of us understand that in case it is to be adjudicated on the question of value, this Government by this provision shows clearly its intention not to take any advantage of the owners of these vessels.'"

He adds, on page 1932:

* * * "There are so many questions that have come up that I am perfectly willing and shall freely vote to take these vessels, their title and possession, with the understanding that the Government is to operate or lease them or charter them and equip them, and

then I hope that our Government, following the second section here, will proceed upon the basis that all rights of all people and of all citizens, of whatever nationality, will be regarded and respected, for our Government is too big to do anything else."

Mr. McFadden says, on page 1932:

* * * "If, on the other hand, the real ownership of these boats is not vested in the German Government, I am interested just to the extent to see that confiscation of private property is not had by this Government without some basis of settlement being provided for eventually. I do not say at this time, but eventually, but believe the law should be made very specific now; and in that connection I want to quote a statement which was made by the State Department, with the authority of the President, on February 8, 1917, in which it stated:

" 'The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and the subjects of foreign States.'

"Then I also want to quote from the Presiden't message to this Congress on April 2, in which he said this:

" 'Just because we fight without rancor and without selfish object, seeking nothing for ourselves but what we wish to share with all free peoples, we shall, I feel confident, conduct our operations as belligerents without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.

" 'It will be all the easier for us to conduct ourselves as belligerents in the high spirit of right and fairness because we act without animus.'

"This is a war measure and warranted by the exigencies of the case; but, however grave the situation, shipping that came to our ports in the legitimate prosecution of ocean traffic, the property of individuals and companies, should not be seized without rendering at the proper time just compensation therefor."

* * * * *

* * * "but, on the other hand, if it is finally determined that these boats are the property of individual citizens of Germany, after the war is over that prompt and full settlement will be provided for to the individual citizen."

APPENDIX "B"

PERTINENT PROVISIONS OF VERSAILLES TREATY

Part VIII.

"REPARATION.

"Section 1.

"GENERAL PROVISIONS.

"ARTICLE 231.

"The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

"ARTICLE 232.

"The Allied and Associated Governments recognize that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present treaty, to make complete reparation for all such loss and damage.

"The Allied and Associated Governments, however, require, and Germany undertakes that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto.

"In accordance with Germany's pledges, already given, as to complete restoration for Belgium, Germany undertakes, in addition to the compensation for damage elsewhere in this Part provided for, as a consequence of the violation of the Treaty of 1839, to make reimbursement of all sums which Belgium has borrowed from the Allied and Associated Governments up to November 11, 1918, together with interest at the rate of five per cent. (5%) per annum on such sums. This amount shall be determined by the Reparation Commission, and the German Government undertakes thereupon forwith to make a special issue of bearer bonds to an equivalent amount payable in marks gold, on May 1, 1926, or, at the option of the German Government, on the 1st of May in any year up to 1926. Subject to the foregoing, the form of such bonds shall be determined by the Reparation Commission. Such bonds shall be handed over to the Reparation Commission, which has authority to take and acknowledge receipt thereof on behalf of Belgium.

"ARTICLE 233.

"The amount of the above damage for which compensation is to be made by Germany shall be determined by an Inter-Allied Commission, to be called the *Reparation Commission* and constituted in the form and with the powers set forth hereunder and in Annexes II to VII, inclusive, hereto.

"This Commission shall consider the claims and give to the German Government a just opportunity to be heard.

"The findings of the Commission as to the amount of damage defined as above shall be concluded and notified to the German Gov-

ernment on or before May 1, 1921, as representing the extent of that Government's obligations.

"The Commission shall concurrently draw up a schedule of payments prescribing the time and manner for securing and discharging the entire obligation within a period of thirty years from May 1, 1921. If, however, within the period mentioned, Germany fails to discharge her obligations, any balance remaining unpaid may, within the discretion of the Commission, be postponed for settlement in subsequent years, or may be handled otherwise in such manner as the Allied and Associated Governments acting in accordance with the procedure laid down in this Part of the present Treaty, shall determine."

" ARTICLE 236.

Germany further agrees to the direct application of her economic resources to reparation as specified in Annexes III, IV, V, and VI, relating respectively to merchant shipping, to physical restoration, to coal and derivatives of coal, and to dye-stuffs and other chemical products; provided always that the value of the property transferred and any services rendered by her under these Annexes, assessed in the manner therein prescribed, shall be credited to her towards liquidation of her obligations under the above Articles.

"ARTICLE 237.

The successive installments, including the above sum, paid over by Germany in satisfaction of the above claims will be divided by the Allied and Associated Governments in proportions which have been determined upon by them in advance on a basis of general equity and of the rights of each.

For the purposes of this division the value of property transferred and services rendered under Article 243, and under Annexes III, IV, V, VI, and VII, shall be reckoned in the same manner as cash payments effected in that year.

"ARTICLE 242.

The provisions of this Part of the present Treaty do not apply to the property, rights and interests referred to in Sections III and IV of Part X (Economic Clauses) of the present Treaty, nor to the product of their liquidation, except so far as concerns any final balance in favour of Germany under Article 243 (a).

"ARTICLE 243.

The following shall be reckoned as credits to Germany in respect of her reparation obligations:

(a) Any final balance in favour of Germany under Section V (Alsace-Lorraine) of Part III (Political Clauses for Europe) and Sections III and IV of Part X (Economic Clauses) of the present Treaty;

• • •

(c) Amounts which in the judgment of the Reparation Commission should be credited to Germany on account of any other transfers under the present Treaty of property, rights, concessions or other interests."

• • •

"ARTICLE 244.

"ANNEX I.

"Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories:

"(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea, or from the air, and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising.

"(2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or mal-treatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation, of exposure at sea or being forced to labour), wherever arising, and to the surviving dependents of such victims.

"(3) Damage caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims of all acts injurious to health or capacity to work, or to honour, as well as to the surviving dependents of such victims.

"(4) Damage caused by any kind of maltreatment of prisoners of war.

"(5) As damage caused to the peoples of the Allied and Associated Powers, all pensions and compensation in the nature of pensions to naval and military victims of war (including members of the air force), whether mutilated, wounded, sick or invalided, and to the dependents of such victims, the amount due to the Allied and Associated Governments being calculated for each of them as being the capitalized cost of such pensions and compensation at the date of the coming into force of the present Treaty on the basis of the scales in force in France at such date.

"(6) The cost of assistance by the Government of the Allied and Associated Powers to

prisoners of war and to their families and dependents.

"(7) Allowances by the Government of the Allied and Associated Powers to the families and dependents of mobilized persons or persons serving with the forces, the amount due to them for each calendar year in which hostilities occurred being calculated for each Government on the basis of the average scale for such payments in force in France during that year.

"(8) Damage caused to civilians by being forced by Germany or her allies to labour without just remuneration.

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.

"10) Damage in the form of levies, fines and other similar exactions imposed by Germany or her allies upon the civilian population."

"ANNEX III.

"(1) Germany recognizes the right of the Allied and Associated Powers to the replacement, ton for ton (gross tonnage) and class for class, of all merchant ships and fishing boats lost or damaged owing to the war.

"Nevertheless, and in spite of the fact that the tonnage of German shipping at present in existence is much less than that lost by the Allied and Associated Powers in consequence of the German aggression, the right thus rec-

ognized will be enforced on German ships and boats under the following conditions:

"The German Government, on behalf of themselves and so as to bind all other persons interested, cede to the Allied and Associated Governments the property in all the German Merchant ships which are of 1,600 tons gross and upwards; in one-half, reckoned in tonnage, of the ships which are between 1,000 tons and 1,600 tons gross; in one-quarter, reckoned in tonnage, of the steam trawlers; and in one-quarter, reckoned in tonnage, of the other fishing boats.

"(2) The German Government will, within two months of the coming into force of the present Treaty, deliver to the Reparation Commission all the ships and boats mentioned in paragraph 1.

"(3) The ships and boats mentioned in paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly, the German merchant flag; or (b) are owned by any German national, company or corporation or by any company or corporation belonging to a country other than an Allied or Associated country and under the control or direction of German nationals; or (c) are now under construction (1) in Germany, (2) in other than Allied or Associated countries for the account of any German national, company or corporation.

"(4) For the purpose of providing documents of title for the ships and boats to be handed over as above mentioned, the German Government will:

"(a) Deliver to the Reparation Commission in respect of each vessel a bill of sale or other document of title evidencing the transfer to the Commission of the entire property

in the vessel, free from all encumbrances, charges and liens of all kinds, as the Commission may require;

"(b) Take all measures that may be indicated by the Reparation Commission for ensuring that the ships themselves shall be placed at its disposal.

"(5) As an an additional part of reparation, Germany agrees to cause merchant ships to be built in German yards for the account of the Allied and Associated Governments as follows:

"(a) Within three months of the coming into force of the present Treaty, the Reparation Commission will notify to the German Government the amount of tonnage to be laid down in German shipyards in each of the two years next succeeding the three months mentioned above.

"(b) Within two years of the coming into force of the present Treaty, the Reparation Commission will notify to the German Government the amount of tonnage to be laid down in each of the three years following the two years mentioned above.

"(c) The amount of tonnage to be laid down in each year shall not exceed 200,000 tons, gross tonnage.

"(d) The specifications of the ships to be built, the conditions under which they are to be built and delivered, the price per ton at which they are to be accounted for by the Reparation Commission, and all other questions relating to the accounting, ordering, building and delivery of the ships, shall be determined by the Commission.

"Germany undertakes to restore in kind and in normal condition of upkeep to the Allied and Associated Powers, within two months

of the coming into force of the present Treaty, in accordance with procedure to be laid down by the Reparation Commission, any boats and other movable appliances belonging to inland navigation which since August 1, 1914, have by any means whatever come into her possession or into the possession of her nationals, and which can be identified.

"With a view to make good the loss in inland navigation tonnage, from whatever cause arising, which has been incurred during the war by the Allied and Associated Powers, and which cannot be made good by means of the restitution prescribed above, Germany agrees to cede to the Reparation Commission a portion of the German river fleet up to the amount of the loss mentioned above, provided that such cession shall not exceed 20 per cent. of the river fleet as it existed on November 11, 1918.

"The conditions of this cession shall be settled by the arbitrators referred to in Article 339 of Part XII (Ports, Waterways and Railways) of the present Treaty, who are charged with the settlement of difficulties relating to the apportionment of river tonnage resulting from the new international regime applicable to certain river systems or from the territorial changes affecting those systems.

"(7) Germany agrees to take any measures that may be indicated to her by the Reparation Commission for obtaining the full title to the property in all ships which have during the war been transferred, or are in process of transfer, to neutral flags, without the consent of the Allied and Associated Governments.

"(8) Germany waives all claims of any description against the Allied and Associated Governments and their nationals in respect

of the detention, employment, loss or damage of any German ships or boats, exception being made of payments due in respect of the employment of ships in conformity with the Armistice Agreement of January 13, 1919, and subsequent Agreements.

"The handing over of the ships of the German mercantile marine must be continued without interruption in accordance with the said Agreement.

"(9) Germany waives all claims to vessels or cargoes sunk by or in consequence of naval action and subsequently salved, in which any of the Allied or Associated Governments or their nationals may have any interest either as owners, charterers, insurers or otherwise, not withstanding any decree of condemnation which may have been made by a Prize Court of Germany or of her allies.

"PART X.

"ECONOMIC CLAUSES.

"SECTION IV.

"PROPERTY, RIGHTS AND INTERESTS.

"ARTICLE 297.

"The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

"(a) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation

has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298.

"(b) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

"The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State.

"German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.

"(c) The price or the amount of compensation in respect of the exercise of the right referred to in the preceding paragraph (b) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated.

"(d) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures

of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

"(e) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

"(f) Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in German territory and expresses a desire for its restitution, his claim for compensation in accordance with paragraph (e) shall be satisfied by the restitution of the said property if it still exists in specie.

"In such case Germany shall take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or burdens with which it may have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

"If the restitution provided for in this paragraph cannot be effected, private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices provided for in the Annex to Section III may be made, in order to secure that the national of the Allied or Associated Power may secure compensation for the injury referred to in paragraph (e) by the grant of advantages or equivalents which he agrees to accept in place of the property, rights or interests of which he was deprived.

"Through restitution in accordance with this Article, the price or the amount of compensation fixed by the application of paragraph (e) will be reduced by the actual value of the property restored, account being taken of compensation in respect of loss of use or deterioration.

"(g) The rights conferred by pargaraph (f) are reserved to owners who are nationals of Allied or Associated Powers within whose territory legislative measures prescribing the general liquidation of enemy property, rights or interests were not applied before the signature of the Armistice.

"(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in gen-

eral all cash assets of enemies, shall be dealt with as follows:

"(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting therefrom shall be dealt with as provided in Article 243.

"(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.

"In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under Articles 235 and 260, be

paid direct to the owner. If on the application of that owner, the Mixed Arbitral Tribunal, provided for by Sec VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

"(i) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

(j) The amount of all taxes and imposts upon capital levied or to be levied by Germany on the property, rights and interests of the nationals of the Allied or Associated Powers from November 11, 1918, until three months from the coming into force of the present Treaty, or, in the case of property, rights or interests which have been subjected to exceptional measures of war, until restitution in accordance with the present Treaty, shall be restored to the owners."

"ANNEX.

"1.

"In accordance with the provisions of Article 297, paragraph (d), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursu-

ance of war legislation with regard to enemy property, rights and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction. Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed. Provided that the provisions of this paragraph shall not be held to prejudice the titles to property heretofore acquired in good faith and for value and in accordance with the laws of the country in which the property is situated by nationals of the Allied and Associated Powers.

"The provisions of this paragraph do not apply to such of the above-mentioned measures as have been taken by the German authorities in invaded or occupied territory, nor to such of the above-mentioned measures as

have been taken by Germany or the German authorities since November 11, 1918, all of which shall be void.

"2.

"No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.

"3.

"In Article 297 and this Annex the expression 'exceptional war measures' includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or

courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

"Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the the cancelling of titles or securities.

"4.

"All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the

second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

"5.

"Notwithstanding the provisions of Article 297, where immediately before the outbreak of war a company incorporated in an Allied or Associated State had rights in common with a company controlled by it and incorporated in Germany to the use of trade-marks in third countries, or enjoyed the use in common with such company of unique means of reproduction of goods or articles for sale in third countries, the former company shall alone have the right to use these trademarks in third countries to the exclusion of the German company, and these unique means of reproduction shall be handed over to the former company, notwithstanding any action taken under German war legislation with regard to the latter company or its business, industrial property or shares. Nevertheless, the former company, if requested, shall deliver the latter company derivative copies permitting the continuation of reproduction of articles for use within German territory.

"6.

"Up to the time when restitution is carried out in accordance with Article 297, Germany is responsible for the conservation of property, rights and interests of the nationals of Allied or Associated Powers, including companies and associations in which they are interested, that have been subjected by her to exceptional war measures.

"7.

"Within one year from the coming into force of the present Treaty the Allied or Associated Powers will specify the property, rights and interests over which they intend to exercise the right provided in Article 297, paragraph (f).

"8.

"The restitution provided in Article 297 will be carried out by order of the German Government or of the authorities which have been substituted for it. Detailed accounts of the action of administrators shall be furnished to the interested persons by the German authorities upon request, which may be made at any time after the coming into force of the present Treaty.

"9.

"Until completion of the liquidation provided for by Article 297, paragraph (b), the property, rights and interests of German nationals will continue to be subject to exceptional war measures that have been or will be taken with regard to them.

"10.

"Germany will, within six months from the coming into force of the present Treaty, deliver to each Allied or Associated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

"Germany will at any time on demand of any Allied or Associated Power furnish such

information as may be required with regard to the property, rights and interests of German nationals within the territory of such Allied or Associated Power, or with regard to any transactions concerning such property, rights or interests effected since July 1, 1914.

"11.

"The expression 'cash assets' includes all deposits or funds established before or after the declaration of war, as well as all assets coming from deposits, revenues, or profits collected by administrators, sequestrators, or others from funds placed on deposit or otherwise, but does not include sums belonging to the Allied or Associated Powers or to their component States, Provinces, or Municipalities.

"12.

"All investments wheresoever effected with the cash assets of nationals of the High Contracting Parties, including companies and associations in which such nationals were interested, by persons responsible for the administration of enemy properties or having control over such administration, or by order of such persons or of any authority whatsoever shall be annulled. These cash assets shall be accounted for irrespective of any such investment.

"13.

"Within one month from the coming into force of the present Treaty, or on demand at any time, Germany will deliver to the Allied and Associated Powers all accounts vouchers, records, documents and information of any kind which may be within German territory, and which concern the property, rights and interests of the nationals of those Powers, including companies and associations in which

they are interested, that have been subjected to an exceptional war measure, or to a measure of transfer either in German territory or in territory occupied by Germany or her allies.

"The controllers, supervisors, managers, administrators, sequestrators, liquidators and receivers shall be personally responsible under guarantee of the German Government for the immediate delivery in full of these accounts and documents, and for their accuracy.

"14.

"The provisions of Article 297 and this Annex relating to property, rights and interests in an enemy county, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

"In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section IIIrespecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied.

"15.

"The provisions of Article 297 and this Annex apply to industrial, literary and artistic property which has been or will be dealt with

in the liquidation of property, rights, interests, companies or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 297, paragraph (b)."

APPENDIX "C"

TREATY OF BERLIN

Considering that the United States, acting in conjunction with its co-belligerents, entered into an Armistice with Germany on November 11, 1918, in order that a Treaty of Peace might be concluded;

Considering that the Treaty of Versailles was signed on June 28, 1919, and came into force according to the terms of its Article 440, but has not been ratified by the United States;

Considering that the Congress of the United States passed a Joint Resolution, approved by the President July 2, 1921, which reads in part as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

"Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles,

have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

* * * *

"Sec. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Gov-

ernment, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America."

Being desirous of restoring the friendly relations existing between the two Nations prior to the outbreak of war:

Have for that purpose appointed their plenipotentiaries:

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. FRIEDRICH ROSEN, Minister for Foreign Affairs, and

THE PRESIDENT OF THE UNITED STATES OF AMERICA

ELLIS LORING DRESEL, Commissioner of

the United States of America to Germany,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

Germany undertakes to accord to the United States and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

ARTICLE II.

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions.

(2) That the United States shall not be bound by the provisions of Part I of that Treaty, nor by any provisions of that Treaty

including those mentioned in Paragraph (1) of this Article, which relate to the Covenant of the League of Nations, nor shall the United States be bound by any action taken by the League of Nations, or by the Council or by the Assembly thereof, unless the United States shall expressly give its assent to such action.

(3) That the United States assumes no obligations under or with respect to the provisions of Part II, Part III, Sections 2 to 8 inclusive of Part IV, and Part XIII of that Treaty.

(4) That, while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so.

(5) That the periods of time to which reference is made in Article 440 of the Treaty of Versailles shall run, with respect to any act or election on the part of the United States, from the date of the coming into force of the present Treaty.

ARTICLE III.

The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Berlin.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in Berlin this twenty-fifth day of August, 1921.

ROSEN. (SEAL)
ELLIS LORING DRESEL. (SEAL)

APPENDIX "D"

Claims Agreement Between The United States and Germany.

"Agreement between the United States and Germany for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded between the two Governments on August 25, 1921. Signed at Berlin August 10, 1922.

"AGREEMENT.

"The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

"The PRESIDENT OF THE UNITED STATES OF AMERICA, Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany, and THE PRESIDENT OF THE GERMAN EMPIRE, Dr. Wirth, Chancellor of the German Empire, who, having communicated their full powers, found to be in good and due form, have agreed as follows:

"ARTICLE I.

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the German Government or by German nationals.

"ARTICLE II.

"The Government of the United States and the Government of Germany shall each appoint one commission. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

"ARTICLE III.

"The commissioners shall meet at Washington within two months after the coming in-

to force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

"ARTICLE IV.

"The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

"The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

"ARTICLE V.

"Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moities.

"ARTICLE VI.

"The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

"The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

"The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

"ARTICLE VII.

"The present agreement shall come into force on the date of its signature.

"IN FAITH WHEREOF, the above-named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

"Done in duplicate at Berlin this tenth day of August, 1922.

"(Seal) ALANSON B. HOUGHTON,
"(Seal) WIRTH."

"(EXCHANGE OF NOTES.)

"(The German Chancellor to the American Ambassador at Berlin.) (Translation.)

"Foreign Office.
"No. III A 2451.
"Mr. Ambassador,

Berlin, August 10, 1922.

"In reply to your kind note of June 23, 1922, I have the honor to state to your Excellency as follows:

"The German Government is in agreement with the draft of an agreement communicated to it in the note mentioned, now that some changes in the text have been agreed upon with your Excellency. I have the honor to transmit herewith the draft modified accordingly.

"From the numerous conferences which have taken place with your Excellency, the German Government believes itself justified in assuming that it is not the intention of the American Government to insist in the proceedings of the Commission upon all the claims contemplated in the Versailles Treaty without exception, that it in particular does

not intend to raise claims such as those included in Paragraphs 5 to 7 of Annex 1 of Article 244 of the Versailles Treaty (claims for reimbursement of military pensions paid by the American Government, and of allowances paid to American prisoners of war or their families and to the families of persons mobilized or indeed claims going beyond the Treaty of August 25, 1921.

"The German Government would be grateful if your Excellency would confirm the correctness of this assumption.

"In the view of the German Government it would furthermore be in the interest of both Governments concerned that the work of the Commission be carried out as quickly as possible. In order to insure this it might be expedient to fix a period for the reporting of the claims to be considered by the Commission. The German Government, therefore, proposes that the Commission should consider only such claims as are brought before it within at least six months after its first meeting as provided in Article III of the abovenamed agreement.

"I should be obliged to your Excellency for a statement as to whether the American Government is in agreement herewith.

"At the same time I take advantage of this occasion to renew to you, Mr. Ambassador, the assurance of my most distinguished consideration.

"WIRTH."

"(The American Ambassador at Berlin to the German Chancellor.)

"No. 128. "American Embassy,
"Berlin, August 10, 1922.

"Mr. Chancellor:

"I have the honor to acknowledge the receipt of your note of to-day's date transmitting the draft of the agreement enclosed to you in my note of June 23, as modified as a result of the negotiations that have been carried on between us.

"In accordance with the instructions that I have received from my Government, I am authorized by the President to state that he has no intention of pressing against Germany or of presenting to the Commission established under the claims agreement any claims not covered by the Treaty of August 25, 1921, or any claims falling within Paragraphs 5 to 7 inclusive, of the annex following Article 244 of the Treaty of Versailles.

"With regard to your suggestion that the Commission shall only consider such claims as are presented to it within six months after its first meeting, as provided for in Article III, I have the honor to inform you that I am now in receipt of instructions from my Government to the effect that it agrees that notices of all claims to be presented to the Commission must be filed within the period of six months as above stated.

"I avail myself once more of the opportunity to renew to you, Mr. Chancellor, the assurances of my most distinguished consideration.

"A. B. HOUGHTON.

"Dr. Wirth,
"Chancellor of the German Empire,
"Berlin."